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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA      *
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                                * 11-cr-06-01-JL
                                * April 5, 2012
                                * 2:55 p.m.
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BRIAN MAHONEY                 *
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* * * * *
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TRANSCRIPT OF COMPETENCY HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

Appearances:

For the Government: Arnold Huftalen, AUSA
U.S. Attorney's Office
53 Pleasant Street
Concord, NH 03301

For the Defendant: Paul Garrity, Esq.
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Also present: Andrew Schulman, Esq.

Probation Officer: Jodi Gauvin

Court Reporter: Sandra L. Bailey, LCR, CM, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
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1 I N D E X

2

3 Witness Direct Cross Redirect Recross

4

MIRIAM KISSIN

5

By Mr. Huftalen

5

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By Mr. Garrity

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ERIC MART

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By Mr. Garrity

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By Mr. Huftalen

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Exhibits

ID

Evid.

16

Government's Exhibit No. 2

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17

Government's Exhibit Nos. 1 thru 7

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1 BEFORE THE COURT

2 THE CLERK: The court has before it for
3 consideration this afternoon a competency hearing in
4 Criminal Case 11-cr-6-01-JL, United States of America
5 versus Brian Mahoney.

6 Dr. Kissin, can you hear me?

7 THE WITNESS: Yes, I can.

8 THE CLERK: I'd like to swear you in. If you
9 could stand please and please raise your right hand.

10 MIRIAM KISSIN

11 having been duly sworn, testified as follows:

12 THE CLERK: And for the record, please state
13 your full name and spell your last name.

14 THE WITNESS: It's Dr. Miriam Kissin,
15 K-I-S-S-I-N.

16 THE COURT: Doctor, this is Joe Laplante. I'm
17 the presiding judge in this hearing.

18 THE WITNESS: Good afternoon.

19 THE COURT: We will proceed with your
20 examination in a moment because I'm going to let the
21 prosecution present its case first on competency.

22 Before we get started, two housekeeping
23 issues. One is, Charli, I'm going to be appointing
24 under the CJA co-counsel for Mr. Mahoney. It will be
25 Attorney Schulman. He's here in court today and as of

1 this hearing he's appointed. I'll issue an order with
2 some specifics on that after the hearing. I want to
3 make sure we're as protective of Mr. Mahoney's rights as
4 we possibly can be in this case because there are issues
5 on two levels. One, his competency; and two, a
6 potential conflict of interest issue involving Mr.
7 Garrity. I don't know what -- I'm told that Mr. Mahoney
8 has withdrawn or plans to withdraw his ethical complaint
9 against Mr. Garrity, but to make sure he's fully
10 protected I have Attorney Schulman here, and I don't
11 think there's any issues at all with respect to Attorney
12 Schulman.

13 And the only other housekeeping issue is this.
14 I'm in the middle of a jury trial and the jury is
15 deliberating, so there's a possibility we could be
16 interrupted during this hearing based on either a jury
17 question or a verdict. If that happens, I'll have to
18 suspend these proceedings and go across the hall and
19 conduct those and then return hopefully as soon as
20 possible.

21 All right, are we ready to proceed?

22 MR. HUFTALEN: Yes, your Honor.

23 THE COURT: Please proceed. Why don't you
24 identify yourself for the record.

25 MR. HUFTALEN: Arnold Huftalen, Assistant U.S.

1 Attorney for the government.

2 DIRECT EXAMINATION

3 VIA VIDEOCONFERENCE

4 BY MR. HUFTALEN:

5 Q. Dr. Kissin, can you hear me?

6 A. Yes, I can.

7 Q. If during the course of my questioning of you
8 you can't hear me or you don't understand the question,
9 please wave your hand so I can see it or somehow let me
10 know and I'll try to take care of the issue at that
11 point, all right?

12 A. Okay.

13 Q. Obviously, you're Dr. Kissin. Would you tell
14 Judge Laplante, please, what your background, education,
15 and training are so that he can take your testimony in
16 the appropriate context.

17 A. I'm a forensic psychologist employed by the
18 Bureau of Prisons Department of Justice. My background,
19 I have a doctorate degree in psychology, clinical
20 psychology from Antioch University in Keene, New
21 Hampshire. As part of my degree I had an internship at
22 Bellevue Hospital/NYUMedical Center in New York. That
23 was both general and forensic training. In addition I
24 have a post-doctorate from the University of
25 Massachusetts Medical Center, the Law and Psychiatry

1 Program where I trained post-doc level. Prior to being
2 employed by the Bureau of Prisons I worked for the
3 Massachusetts Trial Court System as a forensic
4 psychologist attached to the court.

5 Q. Dr. Kissin, I marked a copy of your CV as
6 Government Exhibit 2, and your Honor, I've given a copy
7 to defense counsel. I request that it be accepted by
8 the court as Exhibit 2.

9 MR. GARRITY: No objection, judge.

10 THE COURT: It's admitted.

11 (Government's Exhibit 2 admitted.)

12 Q. Dr. Kissin, as you know, you're here to
13 testify concerning the competence of Mr. Brian Mahoney
14 --

15 THE COURT: Why don't you cut through one
16 thing. You've premarked a number of exhibits, right?

17 MR. HUFTALEN: I have.

18 THE COURT: They are numbered what, 1
19 through --

20 MR. HUFTALEN: 1 through 7.

21 THE COURT: Are there any objections to any of
22 those exhibits?

23 MR. GARRITY: No, your Honor.

24 THE COURT: So those are all admitted, 1
25 through 7. Sorry to interrupt.

1 (Government's Exhibits 1 thru 7
2 admitted.)

3 MR. HUFTALEN: Thank you.

4 Q. Dr. Kissin, I understand you have another
5 commitment and would like to finish your testimony by
6 4 p.m. if possible. We're going to do everything we can
7 to make that happen.

8 A. Thank you.

9 Q. I can see from the monitor that you can see
10 me, but you can't see who else is in the courtroom. Mr.
11 Mahoney is to my right. He's sitting with his two
12 defense attorneys. As you know, Judge Laplante is in
13 the courtroom along with the deputy clerk and the
14 stenographer. There is a representative from the
15 Probation Office and a few other security personnel.

16 You saw Mr. Mahoney at your workplace at
17 Devens in Massachusetts. You conducted a forensic
18 evaluation of him. You observed him over a period of
19 time and ultimately you reached an opinion concerning
20 his competence; correct?

21 A. Yes.

22 Q. I'm going to ask you to walk us through what
23 you did before you arrived at that opinion. And in
24 order to do that I'd like you to tell us when it was
25 that Mr. Mahoney first came to your facility, when you

1 saw him, the context in which you saw him, how many
2 times you saw him, and we'll move on from there.

3 A. Mr. Mahoney arrived at the Federal Medical
4 Center, Devens, on April 29th of last year, 2011. He
5 was at the facility through June 13, 2011.

6 When he first arrived I was the person that
7 actually did the screening. When someone first comes in
8 they're met there by ideally the person who is going to
9 be doing the evaluation, which was the case, and that
10 after that meeting he was assigned housing. Initially
11 everyone that comes in for a forensic evaluation goes to
12 either a locked unit if they need clearance of their PPD
13 which is basically to make sure they don't have TB, and
14 that's where Mr. Mahoney ended up. It's a locked unit
15 not because he was unstable and have to be in a locked
16 unit, but again, for segregation purposes. He was there
17 for several days until he moved on to our semi-locked
18 unit which is a chance for nursing staff to see him, get
19 the medical evaluations done, which is the procedure for
20 everyone, and it was in there after he was in the open
21 unit, meaning in the housing unit in our psychiatric
22 hospital center which is where all forensic studies go
23 to unless they need a higher level of care, so it's just
24 a general dormitory -- I'm sorry, with cell type of
25 unit.

1 I met with Mr. Mahoney for meetings in my
2 office, so basically he was asked to come for scheduled
3 appointments, which he was able to do. I met with him
4 altogether, including the screening and one other
5 occasion when he was in the locked unit, seven times.
6 Some of those meetings were longer than other meetings.
7 Approximately an hour to two hours each meeting. And in
8 the course of those meetings I got a history from Mr.
9 Mahoney. I also inquired each time with regard to how
10 he was doing at the moment in the institution, and I
11 also conducted an evaluation regarding his competency.

12 Also in the course of the time that he was
13 here I had access to speak to different other
14 individuals that saw Mr. Mahoney. That would be our
15 psychiatry staff that provided treatment of Mr. Mahoney
16 while he was here as well as the nursing staff that were
17 involved more when he was more on a locked unit than the
18 open unit, once you're in the open unit it's on an as
19 needed basis for the nursing staff, and also the custody
20 staff, such as the officers, lieutenants and such that
21 have day-to-day contact with the inmates at the
22 institution.

23 Q. Thank you very much. Now, you prepared a
24 forensic evaluation, forensic report in this case and
25 that's been marked as Exhibit Number 1. The court has a

1 copy, I have a copy, Mr. Garrity has a copy, and I
2 assume you have a copy with you; correct?

3 A. Yes.

4 Q. In the course of your testimony, if you need
5 to refer to that report, please feel free to do so. But
6 if you're referring to something specifically in the
7 report, please identify what it is you're referring to
8 so we all know what you're looking at.

9 Now, I'm not going to walk you through your
10 entire report. The court has already read the report.
11 We don't need to duplicate that testimony orally, but
12 there are some things that are listed in the report that
13 I want you to put on the record so that the record is
14 clear about what it is that you base your opinion on,
15 okay?

16 A. Yes.

17 Q. Could you tell us what background information
18 you received with respect to Mr. Mahoney and how that
19 came to your attention. And by that I mean did he give
20 information about himself, did you review records that
21 were provided to you. And I don't need you to tell us
22 what all the records are because they are listed in the
23 report.

24 A. Oh, yes, I'm just referring to the report.
25 So, there is information from Mr. Mahoney's self-report

1 about himself as well as some records from previous
2 places where he was detained, he was in custody, as well
3 as community treatment centers. So clinical notes from
4 treatment he received in the community.

5 Q. What did you learn about Mr. Mahoney's
6 developmental history?

7 A. There was nothing particularly significant in
8 the developmental history in terms of serious events. I
9 believe in terms of his own maturation, however, it does
10 appear that there's some chaos in the family, that there
11 was domestic violence, he also had a father who was
12 incarcerated for much of his life, so there is some
13 instability in his background. Other than that he did
14 also have some positive experiences growing up. He
15 appeared to be particularly close to his mother. He did
16 talk about himself being quite hyper throughout much of
17 his childhood, having some accidents because of his
18 hyperness, and he thought that was significant,
19 continued throughout much of his life.

20 Q. Let me stop you right there. We're going to
21 talk more about that hyperness later. But did he
22 present to you consistent with having had a history of
23 being hyper?

24 A. Yes. He was what I would describe as hyper
25 throughout much of our meetings.

1 Q. Did Mr. Mahoney tell you what his educational
2 background was and did your observations confirm what he
3 was telling you about his education?

4 A. Mr. Mahoney had some interruption in his
5 schooling originally, he dropped out of high school
6 pretty early on, however, he did complete his high
7 school education while he was incarcerated. At some
8 point he also took some classes at I believe it was
9 Wentworth Technical Institute while he was employed
10 later on in his life. He did not complete his degree
11 because at the time there was lucrative work available
12 because of the Big Dig Project in Boston. He worked as
13 an iron worker. And so he chose to take employment
14 rather than complete his studies. But he told me that
15 he was close to an associate's level degree with the
16 various courses he had taken.

17 Q. And did he tell you whether or not he had any
18 history of substance abuse?

19 A. I have to refresh my recollection. I'm sorry.
20 I believe there's no particular history of substance
21 dependence. There has been some use in regard to some
22 drinking, but he did not report, and I believe he also
23 had a DUI charge at one occasion, but there is not a
24 report on any significant dependence on substance.

25 Q. And were you aware of any medical issues with

1 Mr. Mahoney that impacted significantly on your
2 evaluation process?

3 A. Not particularly that impacted on the
4 evaluation process although potentially he does have a
5 chronic pain condition as a result of an injury that he
6 had sustained when he was many years ago in the course
7 of employment, and in addition he spoke about having
8 been re-injured in the context of some dealings with
9 police officers, so he complained of pain in his ankle,
10 but it did not in my opinion interfere with his -- with
11 the matter at hand with regard to his competency.

12 Q. And finally, what did you learn about his
13 mental health history?

14 A. Mr. Mahoney, as I stated earlier, described
15 that he, from an early age, he was hyper in his
16 interactions. He did appear to be functional in that he
17 was able to interact with other people. He was able to
18 be employed for many years. Apparently successfully.
19 However, he said that he had many interpersonal
20 difficulties with people who would be put off by his
21 mannerisms, his approach. That he would come on very
22 strongly, he would be loud and boisterous, and he said
23 that that feedback that he got in that regard caused him
24 to seek outpatient treatment. In the past he had
25 counseling, he had therapy, he had been on medication.

1 I believe he was on a sedative, Xanax, for a number of
2 years, and I believe he was in and out of counseling for
3 a number of years up until the time of his most recent
4 detention.

5 Q. Now that we've established what you learned
6 about him before you conducted your evaluation, could
7 you tell us what behavioral observations you made during
8 the course of your evaluation. Tell us about the Mr.
9 Mahoney you saw while he was at your facility?

10 A. Mr. Mahoney was cooperative with the
11 evaluation, that he understood what my role was, what
12 the nature of the evaluation is, and what the purpose of
13 the questions that I was asking him and what those were
14 for. He had very strong ideas and opinions about his
15 legal case and was very key on relating those ideas and
16 opinions to me. Sometimes he would do so in kind of a
17 loud and boisterous way and express agitation because of
18 his feelings about the charges, the nature of the
19 charges against him and his legal situation. When that
20 would become especially problematic, I would have to
21 redirect him. I would have to ask him to calm down,
22 which he was able to do on each occasion that I asked
23 him to, but it was very clear to me that he had a lot of
24 emotional feelings about his legal situation and he
25 expressed those significantly. But other than that he

1 was cooperative, he was able to sit with me for up to
2 two hours at a time to provide history, to provide -- to
3 answer my questions regards to the legal proceedings.
4 He also was cooperative with other staff in the
5 institution. There was one occasion in which he got an
6 incident report, which is basically that he had some
7 type of trouble in the institution because of a rule
8 infraction. It specifically had to do with misuse of
9 the telephone incidence. It didn't appear to have
10 anything to do with emotional problems or personal
11 exchange with someone. He broke their rules in the a
12 way the phone was supposed to be used. He got locked up
13 in the locked unit for several days and then he was
14 released, and he handled that adequately. I spoke to
15 him during that time. He said he understood what the
16 situation was, he understood how the system works, and
17 he wasn't particularly distressed about having been
18 locked up and then released.

19 Q. So even though he was somewhat hyper, the only
20 disciplinaries he had was the one you just referenced?

21 A. That is correct.

22 Q. Now, other than the back pain you spoke of,
23 were there any medical evaluations or studies performed
24 on him that we should know about?

25 A. I believe there's general lab work that's

1 conducted on all inmates when they first come into the
2 institution. There was nothing particularly remarkable
3 that had come up as a result of that. And other than
4 his leg and his back pain that he complained of, there
5 wasn't any other medical problems that had come up in
6 the course of his evaluation.

7 Q. As a result --

8 A. I'm sorry, I believe there was, I apologize, I
9 believe there was a history of hypertension. I'd have
10 to look carefully, but he might have been treated for
11 hypertension or there was some question whether that
12 continued, but no acute incidents occurred in the
13 institution.

14 Q. So there were no acute medical issues that
15 related to his behavior of which you're aware; correct?

16 A. Correct.

17 Q. Now, because of his reported psychiatric
18 history and the exhibited mood symptoms that you
19 generally referenced, I understand that he was sent for
20 a psychiatric consult; is that correct?

21 A. Yes, that's correct. Also because he had a
22 history of taking psychiatric medication and that would
23 be another indicator to be seen by a psychiatrist.

24 Q. And can you tell us what the upshot of that
25 psychiatric consult was?

1 A. Mr. Mahoney was seen by the attending
2 psychiatrist. All the individuals here for study are
3 assigned a psychiatrist based on their number, and he
4 was seen by a psychiatrist. He spoke about a history of
5 being prescribed medications in the previous place where
6 he was. I believe he took Seroquel and other
7 medication. Based on the evaluation that the
8 psychiatrist at our institution did he was first
9 prescribed a different mood stabilizer, Oxcarbazepine,
10 Trileptal is the tradename which it's also referred to,
11 it's a mood stabilizer. It's one that's often used.
12 And that was a medication that he remained on throughout
13 the course of his evaluation here. In fact, at one
14 point the dosage of the medication was increased because
15 his symptoms did not remit although he did appear to be
16 somewhat calm and it was expected that he would do even
17 better if the dose were increased. I believe the
18 increase came pretty close to the time that he was
19 released from this institution, so it's unclear how much
20 additional benefit he got from that, but the
21 psychiatrist felt that he was doing better and I would
22 agree with that in terms of ability to remain calm under
23 stressful situations.

24 Q. And can you tell us whether or not he was
25 compliant with the medication regime while he was at

1 your facility?

2 A. Yes. He said he was willing to take
3 medication. In fact, that would be the only way that he
4 would get medication given the status of this
5 institution. He was willing to take it, he was willing
6 to accept it, and he did take the medication.

7 Q. All right. I'd like to now get into the
8 substance of what you did with Mr. Mahoney. I
9 understand that there were some psychological testing
10 that you attempted with respect to him that I'll refer
11 to as the MMPI; is that correct?

12 A. Yes, yes.

13 Q. Can you tell us what happened there?

14 A. The MMPI, the Minnesota Multiphasic
15 Personality Inventory II, is basically it's an
16 assessment of characterological features, personality
17 features, it also gives some information about
18 diagnostic issues such as psychiatric illnesses that
19 someone might have. And basically the result, what it
20 consists of, it's a self-report questionnaire, it's 562
21 questions, yes or no basically that an individual
22 answers about themselves, whether something applies or
23 doesn't apply to themselves, and the various scales that
24 are embedded within the tests that provide information
25 not only about the clinical information I just spoke

1 about but also about the nature of the approach that the
2 individual takes in taking the test. So, for example,
3 someone could be more or less honest in a way they
4 respond or they could be consistent, more or less
5 consistent in regard to responding in similar direction
6 to similar questions. So there's various -- or they
7 could be answering questions in a way that is not
8 realistic. So there's a number of kind of flags that
9 could be raised as a result of this test that can tell
10 you whether the way the answer vets resulted in a valid
11 protocol or invalid protocol. And if the protocol is
12 invalid, then the results that come about, we can't
13 really interpret them clinically. You can't really say
14 this is a good representation of their clinical status.
15 For example, if they are coming up depressed, you can't
16 really say, well, it's true that this person is
17 depressed, because there might be some question about
18 the way they approached the test.

19 So, in Mr. Mahoney's case there were several
20 of these kind of flags that were raised with regard to
21 the validity of the test.

22 The first one is that he tended to respond to
23 the question in a negative way regardless of the context
24 of the question, so basically kind of nay-saying or
25 saying no to everything. So whether the question was

1 asked in a positive direction or negative direction he
2 would just say no. So that kind of gave an indication
3 that overall might not be an accurate representation.

4 He also reported, again, symptoms that are
5 very rare in the population, you would only expect to
6 see them in people that are very compromised
7 psychiatrically, and to have someone that's generally
8 pretty functional that doesn't present in other settings
9 in a way that's unusual or would be unusual for them to
10 endorse this number of symptoms, it didn't coincide with
11 the behavioral observations that could be made about
12 him. So that was another red flag that potentially
13 invalidated the instrument.

14 And the third sort of problem with the
15 approach to the test is that Mr. Mahoney tended to
16 basically deny negative things about himself around the
17 test, but not only very negative things, but also kind
18 of innocuous negative things that most people might
19 have. So basically not saying anything negative about
20 himself, which again, raises a question of whether, how
21 honestly, how truthfully he approached the test.

22 So given all of those invalidity indicators
23 that red flags are raised on, it invalidated the entire
24 protocol so you cannot further interpret the clinical
25 information that might otherwise be derived from this

1 evaluation.

2 Q. Now, in your experience is it unusual that
3 someone's results on the MMPI are found to be not valid?

4 A. It's not at all unusual. It's kind of setting
5 specific, and in a forensic setting it is more usual
6 than not that the protocol would come back invalid for
7 one or more of these type of reasons, so no, it is not
8 unusual.

9 Q. What did you do with him? Tell us how you
10 went about evaluating him to determine whether or not he
11 was competent other than have him take this MMPI?

12 A. So in regard to specifically, I believe you're
13 asking me how I conducted the competency evaluation or
14 the features of the competency evaluation that I
15 conducted?

16 Q. Yes, doctor, but let me interrupt you. I
17 should have stopped you earlier, I apologize. Our
18 stenographer is very good, but you're speaking very
19 quickly. If you could slow down a little bit.

20 A. I will definitely do that. I apologize, it's
21 my New Yorker in me.

22 So, in regard to the competency evaluation
23 basically I use what is referred to as a structured
24 interview, and that is not a specific instrument that I
25 use, I conduct an interview that hits at various points

1 that have to do with competency-related skills.

2 So, in regard to Mr. Mahoney and anybody else
3 that I would be assessing for competency, the things
4 that I would like to know about is his understanding of
5 the charges against him, the potential implications of
6 the charges or the severity of the charges, the history
7 of the charges, why they were arrested, what came about,
8 what type of information, discovery information or
9 evidence might be available in regard to their charges,
10 their evaluation of that evidence, and that I would go
11 on from there to ask him about court proceedings and how
12 a court operates in a generic sense. So, for any
13 defendant, what an attorney does, what a U.S. attorney
14 does, what a defense attorney does, what the judge and
15 jury's role is and all the various court personnel,
16 again in a generic manner. I would then move on and ask
17 the defendant, and this is what I did in Mr. Mahoney's,
18 specifically in his case what his relationship is with
19 his attorney, what his history is with his attorney,
20 whether he trusts his attorney to be able to represent
21 his best interests. Also, in regard to his particular
22 case what might be -- how it might play out in regard to
23 potentially going to trial or taking a plea and what
24 might be reasons to do one versus the other. So, kind
25 of in a general sense what I am trying to get at is the

1 factual information about their charges, making sure the
2 defendant understands what the facts are in their
3 charges and also the rational part of it. And the
4 rational having to do with their understanding of the
5 potential implication of their charges in regard to the
6 court case. So how, you know, what they might be
7 facing, how significant the charges are, how they might
8 go about defending themselves, what information might be
9 necessary to share with an attorney, and then their
10 willingness to do that with their attorney.

11 And finally I would ask Mr. Mahoney about his
12 ability to make decisions based on information available
13 to him. And that would have to do with some
14 hypothetical questions about taking a plea versus taking
15 a case to trial, both generically and in his particular
16 case, what might he consider, why he might consider one
17 direction versus another, what might make him do that.

18 So those are kind of generally the elements of
19 a competency evaluation.

20 Q. Now, you reviewed two other reports that have
21 been prepared in this case by Dr. Mart which are marked
22 as Government's Exhibits 3 and 7. And Dr. Mart, as you
23 know, used a tool called a MacArthur Competence
24 Assessment Tool?

25 A. Yes.

1 Q. I'm not going to ask you to go into detail on
2 what Dr. Mart's opinion was at this point in time, but
3 generally what is the MacArthur Assessment Tool, and do
4 you use it, and if not, why not?

5 A. The Competence Assessment Tool - Criminal
6 Adjudication, that's kind of the general, that's the
7 full name of it, basically it's an instrument that's
8 widely used to assess competence. It's the formal
9 instrument that hits on the elements that I spoke about
10 that are relevant to competency skills. So, there's an
11 understanding section, and that has to do with that kind
12 of factual information that I had spoke about. There's
13 -- the second section is the reasoning section, and that
14 has to do with being able to understand how a court
15 works but generically, so some of the personnel that are
16 involved, the different players, the different sides and
17 how they might interact, again, not about the
18 individual's own case, but how much they know about how
19 a court operates and what one might expect in a court
20 setting, and that's done through kind of hypothetical
21 questions that aren't about the person's own case.

22 And the last section is --

23 Q. Dr. Kissin, excuse me.

24 A. Yes.

25 Q. I'm going to have to ask you to slow down

1 again.

2 A. I'm sorry.

3 Q. It's quite all right. If you see me do this.
4 Go ahead.

5 A. If you do that once in a while, that would
6 help me.

7 The last section is the reasoning section.
8 I'm sorry, the last section is the appreciation section,
9 and that has to do with kind of what it sounds like, a
10 person's appreciation of their own situation. So, their
11 own case within the legal context and the implications
12 of their own case. And that speaks to a person's
13 ability to make decisions based on information that they
14 have about their own case, their ability to work with
15 their attorney in regard to their own case. So those
16 are the kinds of the large categories that are involved
17 in that. And based on the scores of this instrument,
18 one can determine if someone is competent or not
19 competent.

20 Q. Okay. I ask you that because Dr. Mart used
21 it, and you have reviewed what is marked as Government
22 Exhibit Number 6 which is the data from Dr. Mart's use
23 of the MacArthur Competence Assessment Tool; correct?

24 A. Yes.

25 Q. And in sum it really looks at three things,

1 understanding is first, his reasoning is second, and
2 appreciation is third as you've described; correct?

3 A. Yes.

4 Q. Do you cover all of those same issues in your
5 interview process even though you don't use the
6 MacArthur Assessment Tool?

7 A. Yes, I do.

8 Q. I think I asked you if you used it and if you
9 don't, why not, but you didn't answer --

10 A. Oh, I'm sorry. I do not use the instrument,
11 this instrument or any other instrument, but I do cover
12 all of those various skills.

13 The reason I don't use an instrument is I find
14 it easier to do an interview, to kind of guide the
15 interview specific to the issues that might be relevant
16 to this particular case at hand. So, for example, if
17 someone has specific issues related to their attorney, I
18 can ask much more questions about that, or if there are
19 other kinds of questions, other kinds of issues that a
20 person might be having, I can expand on that, and I'm
21 not pigeon-holed into a specific instrument. However,
22 all of these issues that are covered by the MacArthur
23 are important, and I do cover all of them by asking
24 those questions though not necessarily in that format,
25 but I do speak to all those things in regard to a

1 competence opinion.

2 Q. Okay. As I understand you, you're not saying
3 the MacArthur Assessment Tool is an invalid tool;
4 correct?

5 A. No, not at all.

6 Q. But would it fair to say that you have the
7 luxury of seeing people over a long period of time and
8 can engage them in much longer conversations and
9 interviews than using the MacArthur Assessment Tool?

10 A. I would say that yes, I do have that luxury,
11 although this tool can be used as part of an evaluation
12 that's also longer in length in observation, so it's not
13 necessarily either or.

14 Q. Okay. Now, I'm not going to go back and ask
15 you to tell us what your observations were with respect
16 to Mr. Mahoney on all of those questions that you talked
17 about when you were telling us that your questions went
18 to the issue of whether he understood the trial, who the
19 participants were, what his legal consequences were, but
20 please, do in a general sense, I shouldn't say in a
21 general sense, please do tell us what you observed of
22 Mr. Mahoney's ability to communicate to you his
23 understanding of the trial process, what the court
24 process is, I shouldn't limit it to trial.

25 A. Mr. Mahoney had a very, in my opinion, had a

1 very good sophisticated understanding of the court
2 process, more sophisticated than the average person
3 would. He told me specifically that he spent many years
4 doing legal research on his own because of his own
5 criminal case and the situation he finds himself in and
6 hoping to find a solution to that, and to do that he has
7 read legal books, I believe he's also taken some type of
8 a paralegal course that was offered at a local
9 university at some point. So he has some reading, self-
10 teaching and also some I believe formal teaching, more
11 so than the average person that would be entering the
12 court system. And so he had no difficulty answering
13 questions about how a court operates, what the roles of
14 the various participants might be, or any of those kind
15 of factual issues regarding the court process.

16 Q. What did you learn about Mr. Mahoney's
17 perception of the relationship that he had with his
18 defense attorney or has with his defense attorney in
19 this case?

20 A. Mr. Mahoney had very strong opinions about his
21 attorney, in fact this is his second attorney, he had a
22 previous attorney that he had some similar problems
23 with, and he was very upset that he had a particular
24 understanding of how his case should be adjudicated, the
25 direction his defense should go in, the type of issues

1 that should be raised in order to defend himself against
2 the charges, and he was very displeased with his
3 attorney, with Mr. Garrity, because he was not willing
4 to go along with Mr. Mahoney's ideas in regard to how to
5 defend his case. Mr. Mahoney said that he felt he was
6 in a very good position to know what's relevant in his
7 case. He had been, as he said, studying this case for
8 many years, living this case for many years. He felt
9 that nobody knew the issues better than him. And a lot
10 of time he was disparaging about Mr. Garrity, attorneys
11 in general, saying that he's not sure they can really do
12 a better job defending someone than the person
13 themselves or the person that puts in the effort like he
14 has to get information about their own case or their own
15 situation.

16 So, the crux of his displeasure was really
17 that his attorney was not willing to go in the defense
18 direction that he wished to go in.

19 Q. Could you define delusional for us?

20 A. Delusion is, or delusional is a clinical term.
21 It basically refers to an individual, a belief system or
22 a belief an individual holds that is false and that does
23 not change despite offering other information that
24 disputes the false belief. So regardless of what might
25 be going on, the person continues to hold on to the

1 belief. And there's various types of subsets of
2 delusions that people might suffer from on a clinical
3 illness.

4 Q. In the month and a half that Mr. Mahoney was
5 at your facility, did you see evidence of delusional
6 thoughts on his part?

7 A. I did not see any evidence in delusional
8 thoughts at the time that Mr. Mahoney was in this
9 institution. He did not seem to have any ideas or
10 thoughts about events in the world that were generally
11 -- could be disputed by other persons without issue.

12 Q. You understand that at least at some point in
13 time Mr. Mahoney had accused his attorney, Mr. Garrity,
14 of conspiring with the court to thwart his defense in
15 this case. You're aware of that; right?

16 A. Yes.

17 Q. Did that appear to you to be delusional or
18 fact-based in Mr. Mahoney's mind?

19 A. I believe what you're referencing is
20 information that was related to Dr. Mart by Mr. Mahoney.
21 At the time that I evaluated him he did not specifically
22 reference his concerns about his attorney and the judge,
23 so I did not see that.

24 Q. Okay. Could you define disordered thinking
25 for us and tell us what that phrase means in your

1 business?

2 A. Also that is a clinical term. That basically
3 means that the thought process the individual has is
4 somehow interrupted from reality. So, regular thinking,
5 there's a logic flow in the thoughts that people have.
6 They take information from the external world, they make
7 certain conclusions about it, and there is some logic
8 between the information that's provided and the
9 conclusions that they made and the behavior that they
10 displayed. Someone with disordered thinking, that
11 process is basically interrupted or disrupted by
12 psychiatric symptoms. So what they perceive from the
13 outside world is not consensually what another viewer
14 would agree on and is not based in reality, and the
15 conclusions they draw on that are also irrational and
16 not based in reality and they display behavior based on
17 those erroneous conclusions.

18 Q. In your observations of Mr. Mahoney did you
19 see any evidence that he was suffering from disordered
20 thinking as you've defined it?

21 A. I did not.

22 Q. What was the diagnosis that you came to with
23 respect to Mr. Mahoney?

24 A. The diagnosis that I provided Mr. Mahoney was
25 Bipolar Disorder II, and that is essentially a mood

1 disorder. The difference from a -- a bipolar disorder
2 basically means that the individual's moods kind of go
3 to two extremes. So, from depression to mania.
4 Depression being sad, depressed. Mania being kind of
5 elevated. It can be unrealistically sort of joyful. It
6 could also be agitated, angry. Those are the two ways
7 mania can be expressed.

8 Bipolar II differs from bipolar disorder in
9 that it's kind of a subspecial level of symptoms, so
10 it's a different degree that both depressive and manic
11 symptoms are present, but they are not to the level that
12 would land somebody in a psychiatric hospital, they do
13 not usually present with psychotic symptoms where people
14 sometimes can when they are in the depths of depression
15 or in the grips of mania, but they do have expansive
16 moods. Basically they have trouble sleeping, they have
17 problems with interpersonal relationships because of the
18 mood disorder. There are a variety of ways that it
19 could manifest itself, but it's not as severe as a true
20 bipolar disorder.

21 Q. In the six weeks that Mr. Mahoney was at your
22 facility did you observe any what you referred to as
23 psychotic symptoms?

24 A. I did not.

25 Q. You've just described Bipolar II Disorder

1 which is your Axis I diagnosis. What else did your
2 diagnostic impression include?

3 A. There are also features of anti-social
4 personality disorder. Basically that is an Axis II or a
5 character personality disorder differing from Axis I in
6 that this is really just a way to conceptualize how an
7 individual interacts with the world around them and
8 people around them as opposed to some type of clinical
9 disorder that can be treated with medication, and the
10 reason not a full diagnosis was given but just features
11 of is because he did not meet the full criteria to have
12 that diagnosis. So people with anti-social personality
13 disorder have various characteristics in the way that
14 they -- they might mistreat other people, not think
15 about the consequences of their actions, they are
16 impulsive, they tend to engage in criminal activities,
17 they tend to not hold up their end of their
18 responsibility, they may owe money, they may not pay
19 child support, and this is generally something that's
20 chronic throughout an individual's life and be an
21 important criteria that it would start at an early age,
22 so we would see juvenile arrests, we would see
23 behaviors, criminal behaviors or other kind of
24 assaultive behaviors from an early age. And in Mr.
25 Mahoney's case, from his report or any other information

1 that's available, there's no indication that he
2 presented with these kind of problems at an early age.
3 He described himself as a generally well-behaved child
4 and young person. It was only later in his life that he
5 started getting into trouble with the law.

6 So, the full criteria, full diagnosis did not
7 apply, but some of the features like the repeated
8 criminal acts and impulsivity did apply. So that was
9 the other diagnosis provided.

10 Q. Now, you're aware that Mr. Mahoney reported a
11 prior head injury many years ago; correct?

12 A. Yes.

13 Q. Did it appear to you that that head injury was
14 related to the rapid speech and the manic behaviors that
15 you witnessed?

16 A. From the report that he gave there did not --
17 the head injury did not appear to be a time when any of
18 those things appeared in that he described having these
19 kind of problems throughout his life. And he did not
20 describe any particular changes in behavior or his
21 ability to think or do things or remember based on the
22 head injury, so there was no indication that that was
23 driving the particular symptoms. You also would not see
24 these type of symptoms related to a head injury. You
25 would see a different kind of constellation of symptoms.

1 Q. Now, Dr. Kissin, let me state this. It's been
2 noted of Mr. Mahoney that he has rapid speech and he has
3 difficulty remaining on task. That is consistent with
4 your observations; correct?

5 A. Yes.

6 Q. And do you associate those with his mood
7 disorders?

8 A. Yes, I do.

9 Q. And if he is appropriately medicated did he
10 appear to you to be able to control those issues, his
11 manic behavior and his rapid speech and staying on task?

12 A. I would characterize Mr. Mahoney's behavior
13 even on medication as, his presentation as someone
14 hypomanic, which is again, sort of a self-threshold of
15 mania. So somewhat fed up, somewhat pressured, somewhat
16 loud, but not to the point that he could not be
17 redirected and not to the point that it really
18 interfered with his ability to get things done, to
19 finish a conversation, complete an interview. So things
20 are better with medication, but I would say that this
21 chronic mood disorder that Mr. Mahoney has, that its
22 symptomatic or to some degree, despite so far, any of
23 the medications that he has been on.

24 Q. Your observations of these symptoms, would it
25 be fair to say that in Mr. Mahoney or in anyone who is

1 similarly situated, if he were not to take his
2 medications they could be exacerbated?

3 A. Certainly, that's true. Mood disorders
4 respond well to medication. They also tend to --
5 symptoms tend to come back, sometimes even more
6 significantly than before when treatment ceases. So,
7 you would expect exacerbation of symptoms if you take
8 away treatment.

9 Q. Now Dr. Kissin, before I ask you for an
10 opinion with respect to Mr. Mahoney's competence I want
11 to go back to something I should have asked you in the
12 beginning. Can you tell me how many forensic
13 examinations or evaluations you've conducted in your
14 professional career, not only with the Bureau of
15 Prisons, but inclusive of all your professional
16 experience?

17 A. Several hundred.

18 Q. And can you tell us whether or not the vast
19 majority of those evaluations led to an opinion on your
20 part that the person was in fact competent?

21 A. That is correct. The vast majority of my
22 opinion was that the person was competent. I did these
23 evaluations in different settings and some of the
24 settings have subsets of individuals that are more or
25 less likely, but for the most part the overwhelming,

1 overwhelming majority where I would opine that they were
2 competent.

3 Q. Do you know if that overwhelming majority is
4 unique to you or whether it's consistent with others who
5 practice in the area where you practice?

6 A. It's consistent with others that, in my
7 immediate location as well as anywhere else that I
8 practice, and that's my understanding in the field as
9 well.

10 Q. As a layperson, I'll ask, why is it that a
11 vast majority are found to be competent in your opinion?

12 A. It is a -- in regards to the criteria for
13 competence it's a pretty high bar to be found
14 incompetent in that the skills that are necessary are
15 pretty basic skills, and to not have those skills
16 someone would have to be quite disordered, would have to
17 be very psychiatrically ill to present in a way that
18 they lack those skills. Even people with mental illness
19 generally do have the skills associated with competency.
20 They would have to be so exacerbated and so symptomatic,
21 and most of the time it has to do with a psychotic
22 disorder such as schizophrenia or a very severe mood
23 disorder that would lead someone to be incompetent. And
24 so those are rare disorders in general and even rarer to
25 be very symptomatic in those, and that is the reason why

1 primarily most people would be found competent.

2 Q. Now, you are aware, Dr. Kissin, that there's a
3 legal definition for competence; correct?

4 A. Yes.

5 Q. You deal with that on a fairly regular basis;
6 is that right?

7 A. Yes.

8 Q. Well, let me ask you this opinion. Based upon
9 your observations of Mr. Mahoney and everything that
10 you've told us about concerning your experience and your
11 education and training, do you have an opinion whether
12 at the time you saw Mr. Mahoney and at the time you
13 issued your forensic report, whether he had sufficient
14 capability to consult with his lawyer with a reasonable
15 degree of rational understanding. And the second half
16 of that question is, whether he had a rational as well
17 as factual understanding of the proceedings against him.
18 Can you answer those two questions?

19 A. Yes.

20 Q. Please do.

21 A. I did believe that he -- I'm sorry?

22 Q. Please do.

23 A. I do believe that at the time that I evaluated
24 him he did have the capacity to appreciate the charges
25 against him, consult with his attorney and make

1 decisions in his case.

2 Q. Now, I know that you met with him over the
3 course of six weeks and there are thousands if not tens
4 of thousands of facts that you relied upon, but are
5 there any significant facts that helped inform those
6 opinions of which you have not testified today that
7 Judge Laplante should hear?

8 A. The bigger issue in regard to the referral
9 that was made for Mr. Mahoney, on information that I
10 received from his attorney at the time that he came in
11 to the institution, there was concern whether or not he
12 really understands the issues, the charges against him,
13 whether he had some type of delusional ideas about the
14 charges against him. In addition, whether he could be
15 calm enough to be able to address those in a court. And
16 so those were the main questions for me when I evaluated
17 Mr. Mahoney, those were the significant concerns.

18 In regard to his ability to comport himself,
19 as I testified earlier, he was able to do that better
20 with medication, but in my opinion he was sufficiently
21 able to do that based on my interaction with him.

22 And in regard to the nature of his
23 understanding of the charges, ultimately what it came
24 down to, it appeared to be a different interpretation of
25 the law than his attorney had or perhaps that other

1 people have, but his ideas were not -- did not appear to
2 be bizarre in regard to the charges. They appeared to
3 be plausible in nature and reality based in regard to my
4 conversation with his attorney and yourself, the
5 conversations that we had in regard to the evidence
6 against him and the information available to the
7 government against him. So those -- I relied on that
8 significantly to be able to make a determination of his
9 thought process and whether it was delusional or
10 disordered, and I did not find either one to be the
11 case.

12 Q. Dr. Kissin, you may or may not know but Dr.
13 Mart is going to testify when your testimony concludes,
14 and if you were in the courtroom today, I probably would
15 wait until Dr. Mart testified and then asked to recall
16 you to ask a few questions, but because you're on
17 videoconference and because we have some time
18 constraints, with the court's indulgence I'm going to
19 ask you a couple questions about Dr. Mart's two reports
20 which you have reviewed, correct, Government's Exhibit 3
21 and 5?

22 A. Certainly.

23 Q. Now, Dr. Mart will certainly testify about his
24 reports, but based upon your review of his reports, does
25 it appear that you and Dr. Mart agree with respect to

1 the observations of Mr. Mahoney's behavioral
2 characteristics?

3 A. For the most part in regard to the way things
4 come across interpersonally I would say that the
5 descriptions that were provided were pretty consistent,
6 more or less depending on the day, that I experienced
7 with Mr. Mahoney.

8 Q. And would it be fair to say, generally
9 speaking, where you and Dr. Mart diverge and go off in
10 different directions on your opinion is that Dr. Mart
11 not only is of the opinion that Mr. Mahoney is
12 incompetent, but he also writes in his report that he
13 saw psychotic traits and that he saw evidence of
14 delusional thought; is that right?

15 A. Yes. Dr. Mart's diagnosis is a bipolar
16 disorder, sort of a higher intensity and degree
17 diagnosis than the Bipolar Disorder II that I provided.
18 And in addition he provides a diagnosis of psychotic
19 features which has to do with a psychotic disorder which
20 I did not see supporting data for in my evaluation.

21 Q. I want to come back around to what you
22 testified to earlier concerning the MacArthur Assessment
23 Tool, and we all recall that you said that there were
24 three basic components to it. The first was
25 understanding, the second was reasoning, and third was

1 appreciation. As you read Dr. Mart's reports, is his
2 opinion divergent from yours primarily based upon that
3 third aspect, appreciation, within the MacArthur
4 Assessment Tool?

5 A. Yes, that appears to be the case.

6 Q. Could you tell us your understanding of how
7 things are scored under that third area, the
8 appreciation?

9 A. So there's basically three possible scores
10 that an individual can receive under the appreciation
11 section, and there's a criteria for the score. The
12 higher the score the better. So if you could score a
13 two or one or zero, a two is desirable, one less so and
14 zero undesirable, and basically the criteria for getting
15 a two is that the answer given is clearly plausible,
16 that it's quite possible that there doesn't seem to be
17 any problems with the person's thinking when answering
18 the question. To get a score of a one, there is some
19 question about the plausibility of the answer given. So
20 where it may not be completely unrealistic or plausible,
21 it's questionable. And to score zero is getting no
22 credit for the particular question, one of two things of
23 the criteria has to be met. Either the reply is
24 completely off base or no reply is given or no
25 explanation is given for a strange reply. So, you can

1 see something like that of a person that is very
2 mentally ill, is very disorganized, might be speaking
3 off topic and really have nothing to do with the
4 evaluation or can't really explain why they are thinking
5 the way they are thinking.

6 And another way you can get a zero score is if
7 it's very clear that the answer that's given is not
8 probable, not plausible, and basically premised on a
9 delusional idea, so that the person has to be delusional
10 in their thinking or they have to be distorting reality,
11 and that's another way that you could get zero credit
12 on.

13 Q. In preparation for your testimony I asked you
14 to explain to me why it is or how it was that Dr. Mart
15 came to the conclusion that Mr. Mahoney was not
16 competent and was in fact delusional; correct?

17 A. Yes.

18 Q. In response to that question you told me it
19 would be helpful if you had the underlying data with
20 respect to the MacArthur Assessment Tool, and we
21 provided that to you; correct?

22 A. Yes.

23 Q. All right, that's what's been marked as
24 Government Exhibit Number 6. I'd like to make specific
25 reference to a few pages in that exhibit, and although

1 the page numbering is quite faint in the bottom right
2 and bottom left corner of successive pages, I would like
3 to direct your attention to page 37 which has the
4 heading at the top of the page, Appreciation Item 17.

5 A. Yes.

6 Q. Could you tell us what you see there and tell
7 us what that means to you?

8 A. Yes. So this is a question that, the section
9 has to do with questions about the individual's own
10 legal case. This particular question has to do with how
11 likely the individual assesses that they are going to be
12 treated fairly within the legal system and there's a
13 likely scale type of answer. So more likely, less
14 likely, or just as likely. It's an opinion and that's
15 important when you ask the question to try to understand
16 the reasoning for the person's opinion.

17 Q. And Mr. Mahoney circled just as likely;
18 correct?

19 A. Well, it would be Dr. Mart that would circle,
20 this would be something that he would administer and
21 score himself. So that would be a -- the answer to that
22 was provided by Mr. Mahoney.

23 Q. Okay. And does it appear that Mr. Mahoney
24 provided more of an answer than just as likely? When
25 asked what are the reasons for thinking that, what does

1 this document reflect Mr. Mahoney said?

2 A. So based on the information that's here it
3 appears that he was asked the reason for his response,
4 which is what you're meant to do on this instrument, and
5 there were some notes provided by Dr. Mart. The first
6 word I cannot make out, but other than that it appears
7 that he stated that in the federal court system that the
8 court has to go by the Federal Rules of Evidence and
9 that he would be given the benefit of the doubt. So
10 basically that supported his answer he would be just as
11 likely to be treated fairly as anybody else.

12 Q. And that factual statement that in the federal
13 court system you have to go by the Federal Rules of
14 Evidence or FRE, does that appear to you to be a
15 delusional statement or a perfectly plausible statement?

16 A. It appeared to me to be a plausible statement
17 and probably a factual statement.

18 Q. And if you were giving this assessment or this
19 test, would you have given a score of one to that answer
20 out of those two answers?

21 A. Okay, given just what is written here and that
22 is all the data that I have available, but if no other
23 information was provided, I wouldn't see a reason why
24 that would be a questionable response or a question
25 whether there was some delusional aspect to their

1 response.

2 Q. I would like to very quickly direct your
3 attention to just a couple more questions. In
4 particular page 39 which has the heading Appreciation
5 Item Number 18. Can you tell us what you see, what's
6 reflected in the answers Mr. Mahoney apparently gave and
7 what that tells you?

8 A. This is a question about how likely the --
9 basically it says do you think that your lawyer is going
10 to help you more or less or the same as lawyers help
11 other people in other cases, and Mr. Mahoney appears to
12 have answered less, that's what's circled, and the
13 reason for his response that was provided in the notes
14 here, he speaks about the judge on the case, Judge
15 Laplante, that he believes the judge gave him an
16 attorney but not a very good attorney, that that was the
17 judge's reasoning, and he also references some other
18 case that he believes the judge had been on where the
19 defendant in that case had a problem. Some of this
20 information I'm getting out of Dr. Mart's report because
21 he references questions, so there's a little bit more
22 data in his report about this answer than actually is
23 written down here, but those are the things that he's
24 referencing. So another case that he's aware of that
25 the judge and his attorney had dealings together and

1 that it was unfair.

2 Q. Dr. Mart ascribed to that question and answer
3 a score of zero; right?

4 A. Correct.

5 Q. And a score of zero would be indicative of
6 clearly implausible or appear to be based on a
7 distortion of reality; right?

8 A. Correct.

9 Q. Does that statement as written appear to you
10 to be completely implausible or does it more likely look
11 like someone's interpretation of a factual scenario that
12 perhaps they misunderstood?

13 A. It certainly could be -- it certainly could be
14 events in the world that were factual. I would need
15 more information. There is nothing specifically in the
16 statement that appears to be delusional unless there was
17 some other information offered by Mr. Mahoney that was
18 different than this.

19 Q. I'd like you to look at one more which is page
20 41, Appreciation Item 19, if you wouldn't mind taking a
21 look at that and what you see?

22 A. So this asks the defendant about how likely
23 are they to share information that they see relevant to
24 their case with their attorney, more or less likely than
25 other people. And Mr. Mahoney answered that he's more

1 likely to share information with his attorney than other
2 people. And the reasoning that he provided is that he
3 said he in fact shared everything with his attorney and
4 even though he had some doubts, but he decided to share
5 everything, and he felt that he sold him out. He said
6 that he's done nothing more than had sold him out.

7 Q. And again, the score ascribed by Dr. Mart as a
8 zero, reflective in your words of being clearly
9 implausible or based on distorted reality; right?

10 A. Correct.

11 Q. Is there anything in those answers that jump
12 out at you that cause you to believe it's clearly
13 implausible or based on distorted reality?

14 A. Well, the phrase selling out, there could be a
15 lot of reasons why someone might feel that way. It
16 could range from actually feeling there is some
17 conspiracy specific to that person which would fall in
18 the delusional sector or they feel that the attorney is
19 not doing a good enough job, or that they are not doing
20 the type of things that they would like them to do, not
21 filing motions, a variety of things. I would need more
22 information but in regard to what is written, just the
23 data that's here, in my opinion there is not information
24 that speaks to distortion of reality or delusions.

25 Q. In your experience have you talked with

1 criminal defendants in this process who were unhappy
2 with their lawyers and perhaps felt the lawyers sold
3 them out?

4 A. I would say that the phrase selling out is a
5 phrase that I hear often and it's certainly a trigger
6 for me to ask further questions to understand what the
7 nature of the relationship really is and why they would
8 feel that way about their attorney.

9 Q. But is it fair to say that that does not
10 trigger in you the thought that this is delusional
11 thought?

12 A. No, certainly not automatically unless some
13 other information is provided that would lead me to it,
14 but not that phrase in and of itself.

15 MR. HUFTALEN: Thank you very much, Dr.
16 Kissin.

17 THE WITNESS: Thank you.

18 THE COURT: One question before the cross
19 starts. The question about, Attorney Huftalen, you
20 questioned the witness about the defendant's belief that
21 his counsel was in a conspiracy against him involving
22 the court, and you were addressing that in the context
23 of delusional thought. That's not referenced in this
24 witness's report. That's because it didn't come up with
25 this witness, right?

1 MR. HUFTALEN: Correct. And she corrected me
2 and pointed out that she was referring to Dr. Mart's
3 report where he raised the issue and she had read that
4 report.

5 THE COURT: That's what I thought. I just
6 want to make sure I understood. Got it. Okay, I am
7 clear.

8 MR. HUFTALEN: Thank you.

9 CROSS-EXAMINATION

10 BY MR. GARRITY:

11 Q. Good afternoon, Dr. Kissin.

12 A. Good afternoon.

13 Q. I'm Paul Garrity and I represent Brian
14 Mahoney. I just want to follow-up on something you said
15 near the end of your testimony.

16 You talked about conspiracy, if there was talk
17 of a conspiracy that would fall into a delusional
18 factor. Did I mishear you?

19 A. I'm sorry, I'm not sure what you're asking.
20 Can you please repeat that?

21 Q. Sure. I thought you said near the end of your
22 testimony if Mr. Mahoney or someone in Mr. Mahoney's
23 position believed that there was a conspiracy with his
24 attorney with someone else, that would fall into what
25 you thought would be delusional type thinking?

1 A. Oh, I'm sorry, yes, I believe I said that if
2 he believed that he was being targeted in a specific
3 way, something about his own characteristics, then that
4 could certainly be indicative of a conspiracy. You
5 would have to ask another question -- sorry, delusional
6 disorder, you would need other information, but that
7 could be information that would be for me to question
8 that.

9 Q. So if Mr. Mahoney or someone in his position
10 thought that there was a conspiracy with his defense
11 attorney targeting him, that would raise questions in
12 your mind of delusional type thinking. Do I understand
13 you correctly?

14 A. A question about whether, if he believed that
15 he was being targeted or anybody else, that could raise
16 that question for me, yes.

17 Q. And delusional type thinking could raise a
18 question in your mind with respect to that individual's
19 competency to stand trial; is that right?

20 A. If the delusion is specifically related to the
21 issues related to their charges it can absolutely be
22 bearing on competency, yes.

23 Q. And in your report, near the end of your
24 report, it's on the last page, you referenced when
25 talking about Mr. Mahoney's ability to consult on a

1 rational basis with his counsel, you came to the
2 conclusion basically at the end that he was able to
3 consult with counsel; is that right?

4 A. I came to the conclusion that he had the
5 capacity to consult with counsel, yes.

6 Q. But you also indicate in your report that he
7 did not express at that time when you wrote the report
8 last year, that he did not express any particular
9 concern that his attorney means to harm him in the
10 context of some type of conceived conspiracy?

11 A. I'm sorry, I'm having a little bit of trouble
12 hearing you.

13 Q. Sure.

14 A. Maybe --

15 Q. Can you hear me better now?

16 A. Yes, yes, thank you.

17 Q. At the end of your report, the second last
18 paragraph on the last page.

19 A. Yes.

20 Q. Do you have it there?

21 A. Yes.

22 Q. You talked about how myself and Mr. Mahoney
23 had apparent divergent views regarding the case against
24 him?

25 A. Yes.

1 Q. And you went on to say, however, he did not
2 express any particular concern that his attorney means
3 to harm him in the context of some type of conceived
4 conspiracy.

5 A. Correct.

6 Q. So obviously, if I read that correctly, if he
7 did conceive that there was some sort of conspiracy
8 against him, that could impact on his ability to
9 rationally consult with his attorney?

10 A. That would be something that I would have to
11 inquire. If he did think it was a conspiracy, I would
12 certainly feel that that would be something to
13 investigate to see if that was relevant to competency,
14 yes.

15 Q. And if someone in Mr. Mahoney's position
16 believed that his defense attorney was in a conspiracy
17 that was targeting him, that would lead you to a
18 conclusion that that person perhaps is not competent to
19 stand trial?

20 A. Again, it would have to be very specific, very
21 specific to the case at hand, but if the individual
22 believed that there was a conspiracy and if the
23 information was delusional in nature and that there was
24 no factual basis to any of the issues that he thought
25 were problematic, then that could certainly undermine

1 somebody's competency. People's definition of
2 conspiracy varies. It could be clinical in terms of the
3 delusional idea or it could be that they might feel that
4 there are parties out there that are not looking out for
5 their best interests, and those would be different.

6 THE COURT: You know, we're at angles on the
7 head of a pin territory with this question, aren't we?
8 Look, if anybody, delusional or not, thinks that their
9 defense counsel is involved in a conspiracy against
10 them, okay, that would seem to me to be a pretty
11 significant barrier to either, A, competency to stand
12 trial; or B, defense counsel's continued role in the
13 trial. Whether it's delusional, just mistaken, if it's
14 a sincerely held belief by a criminal defendant that his
15 lawyer is conspiring against him, I can't imagine how it
16 would not -- how it would not dispositively impact his
17 relationship with his counsel. I mean, how would
18 anybody be able to proceed through a trial in that
19 situation? So, you know, we can, we can go through DSM
20 all day on this. It doesn't seem to me to be a
21 difficult question. If he's of that belief, it
22 certainly impacts -- now, there's the question of
23 whether it's delusional necessarily, and then even
24 whether it is or not, whether it impacts the
25 relationship between defendant and counsel in a way that

1 is just unworkable for trial, does anybody here disagree
2 with that? Anybody?

3 MR. HUFTALEN: No.

4 MR. GARRITY: No, your Honor.

5 THE COURT: Doctor, do you agree with that?

6 THE WITNESS: I think the reason that I was
7 sort of qualifying it is because the issue of
8 competency, the first criteria question is mental
9 illness. So if mental illness is not the reasoning for
10 it, then it stops being a competency issue. Obviously
11 it could be very relevant to the court. What would be
12 relevant to me is whether it is predicated on a mental
13 illness. And so if it's not delusional, it could be
14 problematic, it could certainly stymie the process, but
15 it would not be this type of issue that I would find as
16 a competency-related issue. That does not make it a
17 non-issue certainly.

18 THE COURT: Understood, understood. I
19 understand you completely. By the way, let me ask this
20 question of the doctor. Look, a criminal defendant's
21 belief that his attorney is involved in a conspiracy
22 with anyone, be it the court or any other party, is not
23 self-evident or necessarily delusional, is it? It could
24 have a base in fact under some circumstances, couldn't
25 it?

1 THE WITNESS: That's correct. Your Honor, I'm
2 having a little trouble hearing you as well. Perhaps
3 you're not near your mike.

4 THE COURT: Isn't it? Am I incorrect in
5 thinking that there's -- it sounds as if people are
6 assuming, both the doctors, and maybe I'm
7 misunderstanding, that a criminal defendant's subjective
8 belief that his attorney is involved in a conspiracy
9 with his -- with someone, let's call it the court in
10 this case because that's been the allegation, that does
11 not strike me as necessarily delusional thinking; right?

12 THE WITNESS: I would agree, yes, that is not
13 necessarily delusional thinking.

14 THE COURT: Now, if someone was presented with
15 facts to demonstrate evidence that that's not the case
16 or if someone was not able to substantiate that
17 allegation with anything resembling facts, it might
18 exhibit delusional thinking; right?

19 THE WITNESS: Yes.

20 THE COURT: Okay. I just want to make sure.
21 But we're not saying that just believing your lawyer is
22 involved in a conspiracy against you by definition makes
23 you delusional, are we?

24 THE WITNESS: No, I would not agree with that.

25 THE COURT: Thank you.

1 THE DEFENDANT: Your Honor, if I may just
2 comment, if I could just ask Dr. Kissin one question
3 because it wasn't even heard, I did speak about this
4 competency hearing.

5 THE COURT: Wait, wait, wait. Look, you have
6 a lawyer here.

7 THE DEFENDANT: Right, but I also co-counsel
8 myself, judge, so I have a right.

9 THE COURT: No, you don't, Mr. Mahoney.
10 That's one of the things I've been trying to get to.
11 You've expressed the desire to represent yourself,
12 right? I've been trying to be respectful of that desire
13 on your part, but I can't let you represent yourself
14 unless you are competent to represent yourself. That's
15 one of the things we are doing today. If your lawyer
16 doesn't object to you asking the question, I'll permit
17 you to do it.

18 MR. GARRITY: Can I have one second.

19 (Defendant consulting Attorney Garrity.)

20 THE DEFENDANT: Your Honor, I'm going to ask a
21 question if I may.

22 THE COURT: It's up to your counsel.

23 MR. GARRITY: That's fine, no objection.

24 THE COURT: Okay. I'm going to suggest to you

25 --

1 THE DEFENDANT: I'm --

2 THE COURT: Stop talking. Listen, I'm going
3 to suggest to you so the doctor --

4 THE DEFENDANT: Can I consult with co-counsel
5 about the objection --

6 THE COURT: He said no objection.

7 THE DEFENDANT: Oh, okay.

8 THE COURT: He said no objection. What I'm
9 saying to you is if you're going to ask the doctor a
10 question, speak slowly so she can hear.

11 THE DEFENDANT: I will. I will, judge. But
12 again, I want to be able to express my facts. May I go
13 up to the mike?

14 Dr. Kissin, on page 5 of 15 of your report, if
15 you can turn to that page; please.

16 THE WITNESS: I'm sorry, page 5 of 15?

17 THE DEFENDANT: Page 5 of your report of 15.
18 Turn to page five, the second paragraph; please.

19 THE WITNESS: My numbering seems to be
20 different. I have 16 pages.

21 THE DEFENDANT: Well, we're talking about
22 factual. On page 15 you'll see you asked me a question,
23 Mr. Mahoney, what are you really here for? It's on page
24 5 of 15. And I told you that I was placed on a web page
25 for aggravated felonious sexual assault. I said I was

1 found not guilty of the Charlestown 7 gang rape, that's
2 what brought me to you. You told me at that point that
3 I wanted to make a phone call and you wanted to
4 factually make sure that that was the truth. You called
5 prosecutor Huftalen and I think you called my attorney,
6 and both of my attorneys confirmed to you, as I'm
7 confirming to this court, that I was found not guilty of
8 aggravated felonious sexual assault Charlestown 7 gang
9 rape, of which I'm still on the web page today, isn't
10 that correct? Isn't that a fact? If you want to look
11 at the report.

12 THE WITNESS: I do recall that, yes, both
13 parties did tell me that that was defining that case. I
14 don't recall what they said about the web page.

15 THE DEFENDANT: All right, we're talking about
16 the conspiracy. If you tell an attorney and if
17 prosecutor Huftalen and my own attorney both confirm at
18 that point, without my knowledge, not even knowing that
19 Mr. Mahoney was indeed acquitted of aggravated rape and
20 felonious sexual assault, isn't that factual, isn't that
21 some sort of conspiracy, because why would I be going
22 for the competency hearing when I was factually
23 acquitted of that crime? And you made that phone call
24 and --

25 THE COURT: Look, look, she just told you she

1 made the phone call. She told you what the answer was

2 --

3 THE DEFENDANT: I didn't hear it. Is that a
4 fact, that I was acquitted, yes or no?

5 THE WITNESS: Both parties told me that that
6 was the case for that particular charge.

7 THE DEFENDANT: Thank you. I wanted to make
8 the record that I was acquitted. We're still under the
9 Fifth Amendment. I'm talking about the Fifth Amendment,
10 judge. I don't even have to answer these questions. I
11 was acquitted. I'm acquitted. I think we know that I'm
12 not supposed to answer to the same rape charge twice.
13 The jury found me not guilty in Suffolk Superior Court.
14 Then when he said nonetheless, we're going to go, that
15 should make someone delusional, judge, yes, and make
16 someone incompetent, absolutely, and it did when I went
17 on the web page and I sued with David Hiltz who was in
18 that courtroom February 18 begging me, keep in control.
19 One thing she didn't say. I've never, ever -- I'm a
20 danger to myself, but others or property, and to be
21 still held incompetent and violate the United States
22 Constitution under the Fifth Amendment, she just told
23 you she made a phone call. That should have been the
24 end of that report. I was acquitted, judge, on May 25,
25 1984, whether you like it or not, under the Fifth

1 Amendment, we're entitled under the Fifth Amendment.
2 Says no one should have to answer one question under the
3 Fifth Amendment. And I'm still on the web page for the
4 same exact crime that I was acquitted for aggravated
5 felonious sexual assault in Massachusetts, and that
6 should be the end of this, the case should be
7 dismissed -- and file closed. Thank you. And that's a
8 fact. Those are the facts, when we're talking fact of a
9 conspiracy, yes, it is a conspiracy with these two
10 gentlemen, absolutely.

11 THE COURT: So, stop.

12 THE DEFENDANT: Well --

13 THE COURT: Stop.

14 THE DEFENDANT: Okay.

15 THE COURT: Can I ask your client a question?
16 Are you under the belief today as you sit here that your
17 defense counsel is now or ever has been involved in a
18 conspiracy against you?

19 THE DEFENDANT: Absolutely.

20 THE COURT: Okay.

21 THE DEFENDANT: I'm on the web page, judge,
22 want to turn to the web page --

23 THE COURT: I didn't ask you to explain. I
24 just asked you --

25 THE DEFENDANT: I was acquitted on the

1 charges, your Honor, absolutely, and then Arnie said
2 nonetheless we're going to charge you with, we're going
3 to go back 30 years. You can't do it under the case
4 against the Attorney General of New Jersey, I'm sorry,
5 those are the facts of the case.

6 THE COURT: You don't need to apologize to me.

7 THE DEFENDANT: You're looking about
8 competence. Obviously you know, judge, very much, and
9 you keep, we know I'm very well competent, very much so,
10 and of course prosecutor Huftalen would agree to that.
11 I would think at this point, like I said, she had made a
12 phone call. She asked me what are you really here for,
13 Mr. Mahoney, and I told her, I was put on a web page,
14 and I'm still on that web page for a crime I was
15 acquitted for, but then you have to go back to the Fifth
16 Amendment, and the Fifth Amendment clearly says no one
17 should ever ask you to answer to an acquittal.

18 THE COURT: Okay.

19 THE DEFENDANT: And that's a fact. That's
20 factual. And these two knew about it. So that is a
21 conspiracy, absolutely.

22 THE COURT: All right, I'm going to allow this
23 hearing to continue for now. Proceed.

24 Q. BY MR. GARRITY: Dr. Kissin, if Mr. Mahoney --
25 well, let me ask you this. Were you made aware of

1 letters that Mr. Mahoney wrote to the U.S. Attorney's
2 Office alleging a conspiracy between myself and Judge
3 Laplante, his prior attorney, his investigator, and
4 Judge DiClerico as well?

5 A. Yes, but at the time that he came here he had
6 already written those letters and I did have access to
7 some of those letters and we did talk about that, yes.

8 Q. Did you have those letters in your possession
9 at the time you wrote your report?

10 A. I don't know if I had some of them, but some
11 of them were available in the court file, yes.

12 Q. You had those letters in your report but
13 indicated in your own report that Mr. Mahoney didn't
14 express any particular concern that his attorney means
15 to harm him in the context of some type of a conceived
16 conspiracy?

17 A. That was a direct question that I had placed
18 to Mr. Mahoney. We discussed those letters. I asked
19 him about those letters. I asked him about why he wrote
20 those letters and what his concerns were. And he
21 described his charges and concerns about the charges and
22 basically his idea of the timeline and why he should or
23 should not be charged based on his understanding of the
24 registry laws, and I inquired of him whether he believed
25 this is specifically something that you were doing to

1 him because of something personal to him or that you're
2 trying to harm him, and he specifically said, no, that
3 is not the case, he just doesn't think that you value or
4 agree with the direction of the case that he wants to go
5 in. He thinks that that's, he believes that was not
6 professional and not appropriate, but not that it was
7 specific intent of harm that you had on him. Now, we
8 did discuss that. I specifically posed that question to
9 him because of the letters.

10 Q. Well, if you were to find out that on
11 January 24th of this year he wrote to Mr. Huftalen a
12 letter where he alleges a conspiracy between Judge
13 Laplante, myself and prosecutor Huftalen, is that
14 different than what he told you during your interviews
15 of him?

16 A. I believe the, what you're referring to, what
17 I had referenced earlier, that there was some case that
18 all the parties were involved in that he felt the
19 defendant was offered a deal and then the deal was
20 reneged and he felt like that was -- that that made all
21 the findings unethical and that probably, that would
22 translate to his case as well. That was not anything
23 that he spoke to me about specifically, but that is
24 information I had learned from the U.S. Attorney since
25 then. So if that's what you're talking about, yes, I'm

1 aware of that.

2 Q. If he expanded that conspiracy to include
3 attorney Jeff Levin, an individual who wasn't involved
4 in any way with the prior case he refers to, does that
5 exhibit delusional thinking in your mind?

6 A. I'm not sure. I don't know what references
7 were made to Mr. Levin. I would really have to know
8 what his thinking was and the reason for his thinking,
9 and if the reason of his thinking you could not connect
10 it to any type of reality, you could not explain why he
11 thought that that was relevant, potentially, I suppose,
12 it can be, but it's hard for me to answer without
13 knowing that information.

14 Q. Well, if he wrote to Mr. Huftalen on
15 January 24th of this year, Arnie, Clerk Starr, Judge Joe
16 Laplante, Attorney Jeffrey Levin and Paul Garrity are
17 making sure that you will win, is that evidence of
18 delusional thinking in your mind?

19 A. I'm sorry, I don't quite understand what you
20 read. Can you repeat what you read?

21 Q. Yes. If Mr. Mahoney wrote on January 24th of
22 this year in a letter to Mr. Huftalen, Arnie, Clerk
23 Starr, Judge Joe Laplante, Attorney Jeffrey Levin and
24 Paul Garrity are making sure that you will win, is that
25 evidence of delusional thinking?

1 A. So I think what it says is that he's
2 addressing the letter to U.S. Attorney Huftalen and he's
3 saying that the other people that he is mentioning are
4 going to make sure that he wins?

5 Q. Right.

6 A. Again, I would have to have an understanding
7 of what he means. Just that sentence alone I cannot
8 make that diagnosis of delusional or not. It can be
9 referencing something that he's not explaining very well
10 that can be reality based or it can be delusional
11 thinking. So I need a little more information to be
12 able to make an assessment about delusional thinking of
13 that sentence. It could be either.

14 Q. Well, let me cut to the chase. If he thought
15 there was an ongoing conspiracy involving me, involving
16 his attorney, that would affect his ability to consult;
17 right?

18 A. In a general way, yes. Again, not necessarily
19 what we spoke about, what the judge spoke about earlier
20 that it may not necessarily --

21 THE COURT: It might not -- excuse me, excuse
22 me. It might not involve mental illness you're saying,
23 but it certainly, even if it didn't involve mental
24 illness, could affect the attorney/client relationship
25 in a way that impacted his ability to consult?

1 THE WITNESS: Absolutely, absolutely.

2 Q. BY MR. GARRITY: In your report you talked
3 about Mr. Mahoney exhibiting mild grandiosity when you
4 interacted with him?

5 A. Yes.

6 Q. Grandiosity can affect, can it not, one's
7 ability to consult with his attorney?

8 A. Yes, it can, certainly.

9 Q. And grandiosity can affect whether or not
10 someone is competent to stand trial; is that right?

11 A. It can, usually along with other things. It's
12 usually not in and of itself, but it can be part of a
13 constellation of symptoms.

14 Q. You're aware from your review of the records
15 and speaking to Mr. Mahoney that he was not an attorney;
16 is that right?

17 A. Yes, that's my understanding, he's not an
18 attorney.

19 Q. If you were to be made aware that Mr. Mahoney
20 called himself either an attorney or the number one pro
21 se litigant in the country, that's evidence of more than
22 mild grandiosity; is it not?

23 A. Mr. Mahoney made, not exactly those words, but
24 he made statements about something, referenced about
25 being very knowledgeable in the law, and that is

1 grandi -- that is a grandiose statement, I'm not sure to
2 the degree of grandiosity, but I would certainly say
3 that maybe those kind of statements is grandiose in the
4 context of his life, his situation.

5 Q. Is it fair to say that if you think you're the
6 number one pro se litigant in the country, you're not
7 going to consider advice and consultation with your
8 attorney?

9 A. That's not what he told me at the time that I
10 evaluated him. He said that he would in fact consider
11 at that moment standby counsel and advice from the
12 attorney, so I would say that's not necessarily the
13 case, that he or someone else in that situation
14 wouldn't. But I would question that. I would certainly
15 think that is a reason to question whether he would
16 consider other people's input, especially his attorneys.

17 Q. And Mr. Mahoney, you diagnosed him with
18 bipolar disorder; is that right?

19 A. Bipolar Disorder II.

20 Q. And bipolar disorder involves cycling, does it
21 not?

22 A. It can for some people. They say primarily on
23 one part of it. Usually for Bipolar Disorder II it's
24 more on the hypomanic side, so not so much the depressed
25 side. Not everybody cycles quickly or often.

1 Q. And situational stresses can affect Mr.
2 Mahoney's ability to comport himself; is that right?

3 A. Yes.

4 Q. Can affect his ability to comprehend and
5 understand what's going on in some ways?

6 A. I'd say that that's not necessarily so. It
7 can cause stress. I'm not sure that it would
8 necessarily undermine his cognitive abilities, but
9 stress, under stress people might not be able to take in
10 information as easily or process it as easily to some
11 degree, but not understand what's going on, that might
12 be a bit.

13 Q. When you first saw him when he first came in
14 in April of last year, he was hypomanic; is that right?

15 A. Yes, I would describe that, yes.

16 Q. Speaking very fast; is that correct?

17 A. Yes, yes, at times, yes.

18 Q. Pressured speech; is that right?

19 A. That is the speaking fast, yes.

20 Q. Near the end of your dealings with him at Fort
21 Devens he hadn't really improved all that much; is that
22 right?

23 A. There was some improvement but not a complete
24 remission of his symptoms, no.

25 Q. And that was when he was under this medication

1 you talked about, oxy -- I'm going to mangle the name.

2 A. Oxcarbazepine. Trileptal.

3 Q. And because he -- and that's different than
4 Seroquel, is it not?

5 A. It's a different medication, yes.

6 Q. And because he had not improved much on June
7 -- by June 6th of 2011, the amount or the dosage he was
8 given of that medication was increased; was that right?

9 A. Yes, that's correct.

10 Q. And he was only seen for another seven days
11 after that?

12 A. I believe so. He then left the institution
13 after that, yes.

14 THE COURT: All right, let's go off the record
15 for a minute.

16 (Off the record.)

17 THE COURT: Back on the record.

18 Q. BY MR. GARRITY: Doctor, so his medication was
19 changed or the dosage was changed near the end; is that
20 right?

21 A. Correct.

22 Q. And even with this medication he only showed
23 some partial improvement while he was at your facility?

24 A. I think we couldn't really assess the effect
25 of the increased dose because he left shortly

1 thereafter, but on the dose he was on, yes, partial
2 improvement

3 Q. But his ability to I guess behave himself on
4 an interpersonal basis, is that something you look at
5 when determining whether or not someone was competent?

6 A. It could certainly speak to competency if
7 that's related to his illness, it certainly can.

8 Q. While he was at Fort Devens he was able to
9 comport himself fairly well except for that one
10 disciplinary problem; is that right?

11 A. Yes. And I wouldn't conceptualize that as
12 sort of comportment, that was just a breaking of the
13 rules. Really more I assessed his interaction with me
14 and other people.

15 Q. You're aware that now he's on Seroquel, or are
16 you?

17 A. I believe I was told that, yes.

18 Q. Are you aware that while on the Seroquel or
19 the Seroquel regimen he's been involved in two physical
20 confrontations or fights at his current place of
21 incarceration?

22 A. I believe I was told that he had a fight. I
23 don't know anything else about it, yes, I was told by
24 the U.S. Attorney that there was a fight.

25 Q. Would that indicate to you that his ability

1 not to comport himself interpersonally at his current
2 place of incarceration, would that indicate to you that
3 even with the medication he's on now, that he has
4 difficulty rationally understanding what's going on and
5 perceiving what's going on?

6 A. I don't think it would give me any information
7 about his ability to rationally understand or perceive.
8 It can give me information about his ability to control
9 his impulses. Perhaps I would have to have some
10 information in the context of those fights, whether he
11 was the victim or the perpetrator, and what set him off,
12 but that wouldn't give me any information about his
13 ability to understand or be rational.

14 Q. Okay. That situation in terms of how he's
15 comporting himself in his current place of incarceration
16 is different than how you perceived him when he was at
17 Fort Devens; is that right?

18 A. In that he didn't have any fights when he was
19 here, correct.

20 Q. Would that indicate that he has changed in
21 some ways?

22 A. He did report that he had a fight in a
23 facility right before coming to Fort Devens, and I
24 believe it was over something minor such as a television
25 channel if I recall correctly, so it does seem to be in

1 line with previous behaviors and not very much outside
2 previous behavior. He was able to not do that here.
3 But he does have a history of some altercations before
4 that.

5 Q. And you indicated during your testimony that
6 you set a fairly high bar for deciding whether or not
7 someone is competent or incompetent?

8 A. No, I believe what I said is to -- it is -- to
9 be --

10 THE COURT: You don't need to answer that.
11 You don't need to answer that. I remember your
12 testimony. You said that the bar was high under the
13 standard and you referenced that it involves mental
14 illness. I remember your testimony.

15 Q. When deciding that bar, whether or not someone
16 is above it or below it, you look for psychotic
17 features; is that correct?

18 A. That can be part of the manifestation someone
19 has that would deem them incompetent. That's certainly
20 not the only type of presentation, but it can be.

21 Q. But psychotic features could indicate an issue
22 with respect to competency; is that right?

23 A. I believe what I said is that is one of the
24 most typical ways that would render somebody incompetent
25 if they are suffering psychosis, yes.

1 Q. And Dr. Mart's evaluation found some psychotic
2 features in Mr. Mahoney. Is that what you saw in your
3 review of his report?

4 A. His diagnosis relates that, yes.

5 Q. And the records you reviewed, especially the
6 ones from the Goodwin Center, supported Dr. Mart's
7 finding of psychotic features, did it not?

8 A. There were a number of diagnoses. Some of
9 them all within the same category of mood disorder and
10 some were noted with psychotic features, some noted
11 without psychotic features, but yes, there were other
12 diagnoses consistent with that.

13 Q. In particular did you review a report from
14 Diana Haile dated April 21st of 2010 from the Goodwin
15 Center?

16 A. I believe that was, I'd have to look but I --
17 if you're referring to the report that Dr. Mart refers
18 to in his report?

19 Q. Yes.

20 A. Yes, that was included in the reference that I
21 received from the Goodwin Center.

22 Q. So the record of Mr. Mahoney's medical
23 background did support Dr. Mart's conclusion of
24 psychotic features; is that right?

25 A. Well, no, I'm not -- I'm not sure what you're

1 saying. Are you asking for my independent opinion or
2 are you asking whether Dr. Haile had --

3 Q. Dr. Haile had an opinion of psychotic
4 features.

5 A. Yes, that does appear that Dr. Haile had that
6 opinion, yes, at that time, yes.

7 Q. And given Mr. Mahoney's I guess propensity to
8 cycle at different occasions, is it an unfair reading of
9 his makeup and record that he can be competent on some
10 occasions and then incompetent on others?

11 A. I think that one of the most significant
12 problems Mr. Mahoney has in regard to going forward with
13 his legal case is his ability to comport himself in
14 court, and his mood disorder can certainly affect that,
15 and if he is especially symptomatic in regard to his
16 mood disorder, it certainly can pass that threshold at
17 times. Competence is point in time. So it is possible
18 that he can be less or more able to comport himself and
19 be less or more in control of his mood disorder, that
20 could be to his competency, yes.

21 Q. Did you hear Mr. Mahoney when he spoke here
22 today?

23 A. Yes, I did.

24 Q. Was that the way in which he conducted himself
25 when you were dealing with him?

1 A. I think that that probably was somewhat more
2 agitated than I had seen him although there were times
3 he was agitated, I was able to redirect him at those
4 times. He seems to have trouble settling down more so
5 than when I saw him.

6 Q. And the way in which he conducted himself
7 today during today's hearing, does that raise a concern
8 in your mind with respect to his present competency?

9 A. Again I, in order -- I would have to do a
10 fuller evaluation but certainly behavior like that would
11 be the type of behavior that would raise the question of
12 whether he has other capacities that are related to
13 competency, so yes, that would be a reasonable question
14 to raise.

15 MR. GARRITY: I have no further questions.

16 THE COURT: I just have a couple, doctor,
17 couple questions and we will let you go.

18 Certainly the behavior Mr. Mahoney exhibited
19 today would undermine your competence from a clinical
20 perspective, wouldn't it, in his ability to represent
21 himself in court on a pro se basis?

22 THE WITNESS: I certainly defer to you on that
23 but I would certainly worry more about not having that
24 kind of moderating influence of an attorney to gather
25 his thoughts and present a reasonable coherent

1 narrative, so yes, I would think that that would be more
2 concerning than with an attorney.

3 THE COURT: All right. Now, just a couple
4 more questions. A criminal defendant who believed his
5 attorney was involved in a conspiracy against his
6 interests, if that was a delusional belief, that would
7 render him, would it not, incompetent to stand trial at
8 least as represented by that attorney. Would it not?

9 THE WITNESS: I think certainly by that
10 attorney, and a delusional belief, a general delusional
11 belief may not necessarily be a problem if they are not
12 worried, the defendant is not worried about it in that
13 particular case, so yes, it is the case that if it's
14 just based on that attorney and that attorney goes away
15 and there's no further issue with another attorney, then
16 there may not be a competence issue.

17 THE COURT: Sure, but a delusion that the
18 attorney with him at counsel table was involved in a
19 conspiracy against his interest, that seems to me, if
20 you disagree with me let me know, but that seems to me
21 to be a mental illness based -- mental illness based
22 manifestation of his incompetence to stand trial at
23 least as represented by that attorney; correct?

24 THE WITNESS: Um, your Honor, I think one of
25 the reasons that I'm sort of hesitating in answering

1 your question is when -- the issue of this conspiracy
2 concerns about an attorney that have come up in my
3 evaluation, sounds like they have come up in Dr. Mart's
4 evaluation and in the courtroom, that the definition of
5 conspiracy is sort of important. So what does it mean.
6 Is it that he believes these people are competent? Or
7 that they don't agree with him? That they don't value
8 his opinion? Or that there's a specific -- that he was
9 chosen specifically to in some way be disparaged, and
10 that makes a very big difference, so both can be
11 problematic. But when you think about, you know, mental
12 illness, it really has to be that second part, that he
13 in some way is targeted for some really strange
14 unusual -- not that he thinks he's unfairly treated or
15 unfairly charged but that the charges are not fair, both
16 are problematic, but one need not necessarily speak to
17 mental illness where the other one clearly would.

18 THE COURT: All right. And I have picked up
19 on this idea that there may be a language or a -- a
20 language based issue, a definitional issue of conspiracy
21 that's clouding the issue here because you're talking
22 about a conspiracy that would target him in a specific
23 way. That type of delusion, though, of a conspiracy
24 that would target him in a deliberate way, if a
25 defendant suffered from that delusion, that would

1 certainly render him incompetent to stand trial as
2 represented by that attorney who is part of that
3 delusion; correct?

4 THE WITNESS: Yes, and possibly just in
5 general as well as part of that court system, yes.

6 THE COURT: Sure, especially if he had a
7 capacity to repeatedly form the least about defense
8 lawyers as being involved in those types of conspiracies
9 against him; right?

10 THE WITNESS: Yes.

11 THE COURT: All right, thank you. Do you have
12 any follow-up?

13 MR. HUFTALEN: No, we don't, thank you.

14 THE COURT: All right, doctor, you've been
15 very patient. I know we held you up in your personal
16 life and we apologize, but you are excused.

17 THE WITNESS: All right, thank you very much.

18 THE COURT: Okay. 15-minute recess. I'll see
19 counsel.

20 (Recess taken.)

21 THE COURT: All right, are we all prepared to
22 proceed?

23 MR. GARRITY: Yes, your Honor.

24 THE COURT: All right, before we start again,
25 Mr. Mahoney, I was hoping to talk to you if you let me.

1 THE DEFENDANT: Yes, I'm sorry, but I just
2 want to get the points across, they are very crucial to
3 the case, especially being acquitted.

4 THE COURT: Have a seat, have a seat. By the
5 way, I've never had any doubt in my mind. I don't think
6 any lawyer here has any doubt in their mind that you
7 were acquitted of that Charlestown 7 case. There's no
8 question about that in anybody's mind as far as I'm
9 concerned.

10 THE DEFENDANT: I'm still on the web stage,
11 but at the same time I was acquitted of it 29 years ago.

12 THE COURT: Okay, so here's what I want to
13 talk to you about.

14 THE DEFENDANT: Sure.

15 THE COURT: You've been in court many times
16 with me now.

17 THE DEFENDANT: I have.

18 THE COURT: And I'll say this. I haven't
19 always agreed with you or you with me, but I always have
20 thought we had a pretty good way of communicating with
21 each other.

22 THE DEFENDANT: We have. You are very
23 respectful and of course you're very, very smart.

24 THE COURT: Well, I respect you because you're
25 a defendant in my court and you deserve my respect.

1 THE DEFENDANT: And I try to do the best I
2 can.

3 THE COURT: Now, that said, I've got to tell
4 you this, okay. You were getting excited in the first
5 part of the hearing. Listen, hear me out.

6 THE DEFENDANT: I was.

7 THE COURT: Hear me out. You were getting a
8 little bit agitated, and you were starting to make a few
9 people around you a little bit nervous because you're a
10 rugged guy, right, and nobody wants, nobody wants to
11 have any kind of physical altercation over there, all
12 right?

13 THE DEFENDANT: No, judge, I thought we had an
14 agreeable deal today. That was the whole point.

15 THE COURT: You can blame me for that, blame
16 me.

17 THE DEFENDANT: Well, I know, but you can't
18 keep me forever, Judge Laplante, you're going to have to
19 let me go.

20 THE COURT: Believe me, I want your case to be
21 processed and for you to finish your, either be
22 acquitted or finish your sentence, the sooner the better
23 because it's my obligation, even if I have to impose
24 sentence, to impose one that is not a day more severe
25 than necessary.

1 THE DEFENDANT: And I agree with that and
2 today was the day that was agreed upon, that today was
3 the day, now we're talking about stuff --

4 THE COURT: I know that but there's got to be
5 three people in that agreement. You, the prosecution
6 and me, and I wasn't part of that agreement.

7 THE DEFENDANT: It was two out of three, but
8 two out of three ain't bad.

9 THE COURT: Fair enough. Now, that said,
10 though, I'm going to just ask you this. I'm going to
11 continue with the hearing because I want to hear all the
12 evidence on competency. I want you to do your best to
13 remain calm.

14 THE DEFENDANT: I'm sorry.

15 THE COURT: I don't mean to threaten you
16 but --

17 THE DEFENDANT: No, no, not at all.

18 THE COURT: If things get agitated over there,
19 I'm going to have to ask them to cuff you, and I don't
20 want to do that.

21 THE DEFENDANT: No, I just get excited and
22 emotional because when you just get into the situation
23 of why we are here is because I filed a civil complaint
24 against the Department of Safety, and that's why we're
25 here.

1 THE COURT: Well --

2 THE DEFENDANT: That's a fact. That's
3 factual. Docket number 218210E0121, that's what
4 happened, then they come after me.

5 THE COURT: Are we ready to proceed?

6 MR. GARRITY: We are, your Honor.

7 THE COURT: All right. Have you finished your
8 case, Mr. Huftalen?

9 MR. HUFTALEN: Yes we have, thank you.

10 THE COURT: Mr. Garrity, are you ready to
11 proceed?

12 MR. GARRITY: Yes, your Honor.

13 THE COURT: Please do.

14 MR. GARRITY: Call Dr. Mart.

15 THE CLERK: Please remain standing. Please
16 raise your right hand.

17 ERIC MART

18 having been duly sworn, testified as follows:

19 THE CLERK: For the record, please state your
20 full name and spell your last name.

21 THE WITNESS: Eric G. Mart, M-A-R-T.

22 THE CLERK: Thank you, doctor, please be
23 seated.

24 DIRECT EXAMINATION

25 BY MR. GARRITY:

1 Q. Hi, Dr. Mart. Could you give us your
2 background, educational-wise?

3 A. Yes. I received my bachelor's degree in
4 psychology from what's now New College of Florida, in
5 1976, and I received my doctorate in school psychology
6 from Yeshiva University in 1983.

7 Q. And can you give us some of your work
8 experience since you received your degree?

9 A. Well, I was initially working as a school
10 psychologist before I received my Ph.D., and so I
11 subsequently worked for several years as a school
12 psychologist in districts in New York City, also in the
13 San Francisco Bay area. Then I did a two-year clinical
14 retraining internship in clinical psychology at the
15 Lewis Center in Cincinnati, Ohio. Came to New
16 Hampshire, worked for Concord schools for several years,
17 and been in private practice ever since.

18 Q. And are you a board certified forensic
19 psychologist?

20 A. I am, through the American Board of
21 Professional Psychology.

22 Q. And how long have you been a board certified
23 forensic psychologist?

24 A. I believe since 2007. I think that's correct.

25 Q. And how many board certified forensic

1 psychologists are there in New England?

2 A. In New England. I -- maybe 15. There's 200
3 nationwide about.

4 Q. And how many in New Hampshire?

5 A. Three.

6 Q. And as part of your practice do you conduct
7 competency evaluations?

8 A. I do.

9 Q. And how many competency evaluations have you
10 done in the course of your career?

11 A. I don't have an exact count but certainly over
12 a hundred.

13 Q. And were you asked to conduct a competency
14 evaluation on Brian Mahoney?

15 A. I was.

16 Q. Can you tell us how many times you have met
17 with Mr. Mahoney when conducting evaluations?

18 A. On three occasions. I went up to the jail to
19 see him the first time and there was some confusion
20 about whether he felt he was comfortable proceeding. I
21 saw him a second time on September 23rd of 2011, and
22 then I saw him again on the 27th of last month.

23 Q. And your initial meeting with him, when was
24 that?

25 A. September 23rd of this year -- of last year.

1 Q. And how long was that meeting, how long did
2 that meeting last for?

3 A. I think it was close to four hours.

4 Q. And I'm talking about the initial one where
5 you weren't able to conduct the full evaluation.

6 A. That was about 30 or 45 minutes I think.

7 Q. Did you -- were you able to draw any sort of
8 conclusions or initial impressions of Mr. Mahoney from
9 that meeting?

10 A. I thought that he, just preliminarily, I
11 thought that he seemed at that time to be hypomanic. He
12 had, you know, pressured speech, a rapid pace of speech
13 and circumstantial tangential thoughts.

14 Q. And after that initial meeting you went back
15 out to meet with Mr. Mahoney again, and when was that
16 second meeting?

17 A. September 23rd of 2011.

18 Q. And these two meetings took place at the
19 Strafford County House of Corrections?

20 A. Yes.

21 Q. And the second meeting with Mr. Mahoney you
22 were able to conduct a full-blown competency evaluation?

23 A. I was.

24 Q. Can you tell us what you did in preparation
25 for that meeting with Mr. Mahoney, what you looked at?

1 A. I reviewed a number of psychological reports
2 including the report of Dr. Kissin and report
3 documentation from Diana Haile or Haile, I'm not sure
4 what it is, from 2010, and I also had spoken to you
5 about some of the difficulties you were having in the
6 case.

7 Q. And can you tell us what you did during the
8 test itself when you met with Mr. Mahoney?

9 A. I first reviewed the purpose of the
10 evaluation, limits of confidentiality, in general what I
11 was going to be doing. And then I administered a mental
12 status examination which was the first part of the
13 assessment.

14 Q. And can you tell us what goes into that test?

15 A. Well, you basically take, in the course of
16 having an interview with the individual you're looking
17 at things like their content thought, their speech
18 patterns, their emotional response, any evidence of
19 disordered thinking, any evidence of cognitive
20 impairment, and also listing some history as part of
21 that.

22 Q. And were you able to complete that test?

23 A. I, yes, I was able, it's not really a test,
24 it's more of a procedure.

25 Q. Were you able to complete that procedure?

1 A. I was. There was some difficulty in the sense
2 that he had a tendency to expand on my questions past
3 what was necessary to get the information, so it took
4 longer than it would normally take.

5 Q. In that procedure, did you get a valid reading
6 from that procedure?

7 A. Well, since it's based just on my
8 observations, basically what you're looking for, you're
9 just observing behavior and noting any difficulty, so it
10 would have to be valid.

11 Q. Well, what conclusions or findings did you
12 make in that procedure?

13 A. I noticed that he was -- he had pressured
14 speech throughout the interview. He was alert. Didn't
15 give any signs of distress. He occasionally used
16 something called neologisms which are combined words
17 that he made up himself but were sometimes
18 understandable. I will say that sometimes it was
19 difficult to take notes because the pace of his speech
20 was so fast that I couldn't really keep up. And the
21 other problem was that he would often talk about things
22 that he appeared to believe that I -- seemed to think
23 that I had knowledge of and he would sort of just jump
24 in and start talking about some of these issues and I
25 didn't have that knowledge, you know, so sometimes I was

1 kind of lost in the process.

2 Q. Did he exhibit any sort of delusional thinking
3 during that procedure?

4 A. Well, he -- it was sometimes difficult to
5 tell, once again because he jumps around a lot, and, you
6 know, and can be difficult to follow. At another point
7 in the interview he basically felt that you and several
8 other people who I don't know and the justice were
9 involved in a conspiracy against him.

10 Q. And that conspiracy, was that in your mind
11 evidence of some sort of delusional thought process?

12 A. Well, I thought that it was. I thought that,
13 you know, I mean, he was telling me that you as a
14 defense attorney and the judge in his capacity as
15 prosecutor had gotten -- it was hard to follow but had
16 gotten involved in some kind of criminal conduct and he
17 was in some way the focus of the conspiracy and as a
18 result it had arranged to sort of give him
19 representation but not a very good lawyer, and that, I
20 thought that was highly improbable.

21 Q. Did you do any other procedures when you
22 evaluated Mr. Mahoney?

23 A. Well, I administered the instrument called the
24 Minnesota Multiphasic Personality Inventory-2 and I gave
25 him the reformulated version which is the newest

1 version.

2 Q. And as a result of that procedure were they
3 valid?

4 A. No, it was not possible to interpret it, but
5 not for the usual reasons. Usually an MMPI is invalid
6 because somebody either pretends to be more virtuous and
7 better functioning than they really are. That can
8 happen in a custody case, for example, or you're
9 applying for a job, or somebody who, for example, wants
10 to be found not guilty by reason of insanity or
11 incompetent will fake that, so they will endorse
12 ridiculous amounts of problems, but there's scales that
13 look at what the person is responding consistently to
14 either content. So, question number three would be I am
15 very tall, true or false, and question number 67 will be
16 I am very short and he's answered true to the same
17 errors, you know, you're not paying sufficient attention
18 to either content. So at that part, having elevated
19 scores on that will invalidate the test because the
20 person is not attempting to look good or bad, but they
21 are apparently so confused or so -- or responding so
22 idiosyncratically that they're having what's called
23 variable responses, and so that's what was happening
24 with Mr. Mahoney. I could not interpret his MMPI.

25 Q. Were you able to draw any conclusions even

1 though that procedure was invalid, any conclusions from
2 the MMPI?

3 A. My conclusion was that his thinking was so
4 confused and fragmented that he was responding
5 inconsistently. In other words, he just wasn't able to
6 focus on the test sufficiently to respond to statements.

7 Q. And did you do another procedure when you went
8 to evaluate him?

9 A. Yes, I used a competency interview called the
10 MacArthur Competency Interview for Criminal Adjudication
11 or MacCAT-CA.

12 Q. Were you able to complete that procedure?

13 A. I was.

14 Q. What conclusions did you draw from that?

15 A. Well, it has three sections, and basically
16 those are understanding and reasoning and appreciation.
17 And Mr. Mahoney did very well on the understanding which
18 would be what's the role of the prosecutor, what's the
19 role of the judge, you know, and also did fairly well on
20 the reasoning section, very well actually. Had perfect
21 scores on both of them. And that has to do with a
22 scenario where you're given two facts and you decide
23 which fact is more important in a hypothetical
24 situation, and then give your rationale for choosing
25 that fact. So it would be more important that somebody

1 who was assaulted may have pulled a knife than it was
2 that he went to a baseball game.

3 And the last part is appreciation. You ask
4 questions about the person's own situation like how
5 likely are you -- are you more likely or less likely or
6 just as likely to be treated fairly by the court or
7 questions like that, and he did very poorly on that and
8 had a score that fell in the clinically impaired range
9 partly because it was difficult to follow. His answers
10 were often not on point, and in some cases seemed to
11 reflect delusional understanding of the process, of his
12 situation.

13 Q. Just to address that portion of that test, did
14 you hear Dr. Kissin testify about some of the answers
15 that Mr. Mahoney gave on that test?

16 A. Yes.

17 Q. Can you address those issues that were brought
18 up during Dr. Kissin's testimony?

19 A. Yeah. I think -- well, what I would say first
20 of all that, you know, one of the reasons that it has
21 more than three items is that people sometimes score
22 them differently. So there's room for, you know,
23 professionals to disagree on either a one or a zero.
24 But his score, you know, was so low on the section that
25 it wasn't, in other words, if he got three more points

1 he would still be in the clinically impaired range and,
2 you know, so I think that it's a minor difference in
3 scoring. Also on item 18 she neglected to read the
4 first sentence of his response which was, the question
5 was do you think your lawyer will help you more or less
6 or about the same as lawyers who usually help people who
7 are in trouble, and his response was, he was involved in
8 criminal conduct with Joe Laplante, before she got into
9 I'm going to give you a lawyer but not so good a one.

10 Q. So that was again an indication of this
11 thoughts of conspiracy?

12 A. Yes, and that came through also in
13 conversation.

14 Q. And what conclusions did you draw from that
15 test?

16 A. Well, you know, the test is one of the things
17 I take into account. I thought that he was having
18 difficulty with the appreciation of his own situation.
19 Now, the recent research on this instrument indicates
20 that the understanding and reasoning sections follow
21 along a continuum. In other words, you could have a
22 little bit of reasoning, moderate reasoning or complete
23 understanding, but that you have appreciation of your
24 situation or you don't, and it's not something that's
25 easily fixed because you don't appreciate it. It is

1 usually driven by very compromised cognitive abilities
2 or by thought problems.

3 Q. So, on that continuum, where did he fall
4 again?

5 A. He, according to my scoring, he got a one out
6 of a possible 12.

7 Q. And that would put him in?

8 A. The low end of the clinically significant
9 impairment range.

10 Q. And what diagnosis did you come up with for
11 Mr. Mahoney at the end of your evaluation?

12 A. I thought that he was suffering from bipolar
13 disorder not otherwise specified with psychotic features
14 and personality disorder not otherwise specified with
15 anti-social narcissistic features.

16 Q. And the bipolar disorder not otherwise
17 specified with psychotic features, can you explain how
18 that can impact upon the competency determination?

19 A. Well, it basically is a couple different
20 components in the model that I use that I adopted from
21 Thomas Rizzo, and the first thing you do is you do the
22 functional assessment. Does the person appear to be
23 able to do what they need to do in order to stand trial.
24 And the diagnosis is just there to sort of give you the
25 why, the causal explanation. So Mr. Smith doesn't

1 appear to understand and is not able to consult with his
2 attorney and the reason is, and that could be because
3 he's mentally ill, because he's not very smart or
4 because he's malingering, you know, would be another
5 one. And I think that the reason that Mr. Mahoney was
6 having so much difficulty was that he was suffering from
7 a high level of manic excitement to the extent that his
8 thought processes were distorted.

9 Q. And your conclusion of psychotic features, you
10 found support for that in the medical records you had
11 reviewed?

12 A. In the past he has been reviewed as having
13 Bipolar I, which is much more severe and can break off
14 into psychotic features. The bipolar disorders come in
15 a couple different flavors, and he didn't completely --
16 basically you have somebody who is in a manic state and
17 there's evidence of thought disorder. There's a couple
18 diagnoses that might apply. I thought that he was
19 mostly bipolar and that that was causing some thought
20 disorder and that's the diagnosis that fits best.

21 Q. And people who have this disorder, can they
22 cycle fairly rapidly from periods of rationality to
23 periods of irrationality?

24 A. Yes. People who have bipolar disorder, you
25 know, sometimes they go into remission for long periods

1 of time. Sometimes they stop being manic and become
2 depressed. Sometimes there are some people who cycle
3 rapidly. So you can have a good week and a bad week.
4 That would be atypical but it's something that's
5 remarked on in the literature that people cycle rapidly.

6 Q. Were you able to draw a conclusion about
7 whether or not Mr. Mahoney cycled rapidly or not
8 rapidly?

9 A. Well, I think that there's some indication
10 that he at times can cycle rapidly. So, for example,
11 you and I had a phone conversation about the fact that
12 you had seen him and he seemed, very recently, and that
13 he seemed much calmer and more lucid, and I received a
14 letter from him talking about, you know, that seemed to
15 reflect a better understanding of what was going on. I
16 think that, you know, part of the reason that there
17 might be a disagreement between myself and Dr. Kissin is
18 that I think we saw him at different stages of what was
19 going on for him.

20 Q. The manner in which Mr. Mahoney conducted
21 himself here in the courtroom, did you witness that?

22 A. I did.

23 Q. If I had called you -- I talked about this
24 phone conversation we had?

25 A. Yes.

1 Q. Beginning of this week?

2 A. Yes.

3 Q. You were told about I think being calm and
4 rational and lucid?

5 A. Right.

6 Q. The way in which he conducted himself here in
7 court, is that consistent with that description?

8 A. No.

9 Q. Is that evidence of this cycling you talked
10 about?

11 A. It could very well be, and I think it probably
12 is. I think that he probably has a couple good days
13 sometimes, may go longer periods, may get more agitated,
14 and I think that that's evidence that that may be
15 happening.

16 Q. And the personality disorder you diagnosed him
17 with, can you give us a brief description of what that
18 means?

19 A. A personality disorder is a longer term sort
20 of stable pattern of problematic behavior and attitudes
21 that are more a question of personal style that's
22 extreme enough as to cause problems. So they usually
23 don't -- people are usually not incompetent as a result
24 of personality disorders, but it can play a part in the
25 clinical picture.

1 Q. Did you also find some delusional elements to
2 Mr. Mahoney's thinking?

3 A. Yes. I think that, you know, one of the --
4 well, there's delusions but there's also the problem of,
5 you know, if I'm evaluating someone, it's very unusual
6 for me to basically listen to them for 15 minutes or so,
7 not be able to get a question in, and not understand
8 what they're saying, you know, it's not that I can't
9 understand the speech, it's just that its coming very
10 rapidly, it's jumping from topic to topic. He appears
11 to, he doesn't seem aware or sensitive to the fact that
12 he has this long sort of history with the courts and
13 that I'm not part of it, right, and so he'll mention
14 people as though I'm supposed to know who they are,
15 right, and he also has a tendency to -- he'll start
16 citing laws and talk about the various elements of his
17 case. And I had to check back with you a couple times
18 because I was trying to find out, well, is that, what's
19 going on here exactly. And finally, part of the problem
20 was I couldn't understand what he wanted exactly. In
21 other words, a lot of times I will talk to people and
22 they want to be found incompetent, and whether they are
23 or they aren't because they want the case dropped. And
24 in some cases people would want to be found competent
25 because they think they are fine and they want to

1 proceed because they think they will be innocent. The
2 first time I talked to him his plan was that he would be
3 found competent, try the case himself because he was a,
4 such a good lawyer or, you know, could try it better
5 than anybody else, and that he would plead temporary
6 insanity because he had been driven insane by being put
7 on a web page when he shouldn't have been. So I really
8 was sort of at a loss as to where are we going with
9 this. What are you trying to tell me. What are you
10 trying to accomplish. And I just couldn't follow it.

11 Q. Did Mr. Mahoney exhibit grandiosity when you
12 dealt with him?

13 A. Yes. There were comments about his ability
14 that he understood this area of the law better than
15 anyone. There's really no lawyer that he could get that
16 would know as much about it as he does.

17 Q. And does he, the issue of grandiosity, did
18 that in your opinion impact on the competency issue?

19 A. I think it goes to the appreciation of his
20 situation. So, if as part of your manic problem, your
21 manic process your grandiosity is often part of that,
22 and if you made a decision based on an unrealistic and
23 widely inflated idea of your own abilities, and that's
24 the basis for your opinion, that's not a rational
25 thought process, it's based on false premises, you know,

1 it would be like if I went down to get a job, to be on
2 the cover of GQ because I thought I was an incredibly
3 handsome man and it wasn't true, that could rise to the
4 level of being delusional.

5 Q. At the end of I guess the evaluation process,
6 what was the conclusion you came to with respect to Mr.
7 Mahoney's competence to stand trial?

8 A. At that time he told me that he had taken a
9 combination of medications that had helped in the past.
10 You know, I hadn't seen him previously. And he said he
11 wasn't getting it at the jail. And I mentioned, at the
12 time I saw him, the man as I found him I did not think
13 was competent to proceed, and, you know, the issue of
14 restoration, I thought that, well, maybe if he gets the
15 medication that he thought that he needed or, you know,
16 had another medical consultation, that that might help.
17 So that's where I was left.

18 Q. And just dealing with the ability to consult
19 with counsel, did you think he had the ability on a
20 rational basis to consult with counsel?

21 A. I didn't think so for a number of different
22 reasons. I thought that, number one, he did not believe
23 that you were working in his best interest. And it
24 wasn't just a question of like, well, you know, some of
25 the clients say, well, they just assigned me a public

1 defender and, you know, that's the prejudice against
2 that group. It was more that you were actively involved
3 with the court in a conspiracy to undermine his ability
4 to represent himself and present a defense. And I, you
5 know, I guess anything is possible, but I thought it was
6 highly unlikely. So if that's what you think about your
7 lawyer, I don't know how you could consult with him
8 appropriately.

9 And I also thought that his conviction, that
10 he had a much better grasp of the situation legally than
11 you, or theoretically any lawyer that could be gotten
12 for him was problematic because he would always think
13 that he had a better idea.

14 Q. After that evaluation, did you receive any
15 sort of correspondence from Mr. Mahoney?

16 A. Actually I received some correspondence. I
17 got it I think the day after or two days after I saw him
18 here the second time -- oh no, I did, I'm sorry, I got
19 one in between from him about his concerns about being
20 found incompetent. And what I remember was on the front
21 of the envelope highlighted in yellow was thanks to you,
22 Dr. Mart, I'm still in jail or still incarcerated, which
23 I thought was something that might go inside the letter
24 would be more appropriate.

25 Q. Did that correspondence you received from Mr.

1 Mahoney change your opinion with respect to his
2 competence or did it have any impact or relationship to
3 the competency determination you had made?

4 A. I thought it was part -- it didn't surprise me
5 given his presentation. I thought it was more evidence
6 of, the letter was rambling, I think I noticed that one
7 of the sentences had, you know, six lines, seven lines,
8 and it was difficult to follow, and once again,
9 referenced a lot of things that were difficult for me to
10 understand.

11 Q. Did he allege you were part of this conspiracy
12 in that letter?

13 A. I honestly don't recall.

14 Q. Did you meet with Mr. Mahoney last month?

15 A. I did.

16 Q. And were you present in court when we had a
17 hearing before you met with him?

18 A. Yes.

19 Q. And you were able to witness Mr. Mahoney at
20 that time as he presented himself in court?

21 A. I was.

22 Q. Did you have any -- were you able to draw any
23 conclusions about how he presented himself in court that
24 day?

25 A. I thought on that day that he seemed more

1 manic, incrementally more manic than he had the last
2 time I had seen him. You know, some of these things
3 that you hear are hard to describe that he actually had,
4 and people here might notice he was actually having what
5 are called clang associations where one word gets used
6 in another way, I think there was something about the
7 chain of custody and it was sort of being conflated
8 with, you know, being incarcerated and the chain, you
9 know, like having a ball and chain, and there were a few
10 other instances of that and that can be evidence of --

11 THE COURT: Chain of custody, yeah. My
12 recollection was the concept of chain of custody, that
13 the concept of custody there properly applied is custody
14 of evidence handling that's presented at trial and Mr.
15 Mahoney was conflating with the idea of being in custody
16 for Fourth Amendment purposes or for Eighth Amendment
17 incarceration purposes, and I had the same observation.

18 THE WITNESS: Right, exactly.

19 Q. And after seeing him in the courtroom, did you
20 and I go meet with him in the holding cell down in the
21 marshal's office?

22 A. Yes.

23 Q. And did you have an opportunity to interview
24 Mr. Mahoney at that time?

25 A. I did.

1 Q. How long did that interview process take?

2 A. I think it was 40 minutes.

3 Q. Were you able to -- what did you observe
4 during that interview process or what conclusion did you
5 draw from it?

6 A. It was similar to the last time only I thought
7 there was a little more pressure. You know, he was
8 rapidly moving from -- although his attitude towards you
9 and towards the court was more positive at that point,
10 and he was talking about the fact that he would be happy
11 to have you represent him and, but he would also talk
12 about this issue of the Charlestown 7 and the current
13 case comes up a lot, and that there was talk about a
14 local judge and a civil suit, and I asked him about, I
15 said, look, what happens if you're competent, what
16 happens if you're incompetent, which one is better. He
17 showed some ability, you know, particularly if you were
18 helping him focus on what was going to happen, but that
19 he was, you know, he started citing cases, talking about
20 the Interstate Commerce Clause, and he thought at that
21 point that, he reiterated that he thought he was more
22 experienced in sex offender registration law than any
23 lawyer who might represent him. And he told me that
24 David Hilts and Attorney Pike were trying to correct
25 their mistake. I wasn't sure what he meant. But at

1 that time he did not seem to think there was a
2 conspiracy between the court and yourself.

3 Q. Did Mr. Mahoney refer to a judge in Rochester
4 District Court during that meeting?

5 A. Yeah, that's an example of what I was talking
6 about. He was talking about the judge picking up a
7 document and talking about, it wasn't clear to me
8 whether he had or hadn't been convicted or was, you
9 know, I mean one of the things I guess I'm most struck
10 by it is that, you know, before someone, one of the
11 problems he would have in proceeding is just a lot of
12 the time I don't understand what he's saying, either
13 because it's going so rapidly or it's jumping around or
14 there's just unusual ideas involved.

15 THE COURT: What's the term you used about
16 associations?

17 THE WITNESS: Loose associations.

18 THE COURT: Loose associations. Thank you.

19 Q. Was the reference, let me ask you this, you
20 were made aware before you did your first evaluation of
21 the basic elements of the case involving Mr. Mahoney?

22 A. Yes.

23 Q. When he started talking about the judge in
24 Rochester District Court, did that appear to you to be
25 related in any way to the case pending against him in

1 this court?

2 A. Not that I could follow. In other words,
3 there seemed to be -- that's what I mean by sort of
4 tangential thinking. It goes from I was wrongly put on
5 a website and there is a judge and there was this other
6 thing, there is going to be a civil suit and everything
7 else, and I think that, without getting too much into
8 it, I think my understanding of the facts of the case,
9 what's actually being tried from you, is that it's
10 pretty straightforward, you know, were you there other
11 than the night of the 9th, not that there's five judges
12 in different situations involving trials and all kinds
13 of laws that may or may not apply.

14 Q. Did he also talk about in that meeting that
15 took place in the holding cell, did he talk about some
16 sort of beating that took place in 2007?

17 A. Right. Yeah, he had also sent me pictures of
18 I think of his arm and his hand in a beating by police
19 that occurred when he had been brought in, and I really
20 wasn't -- once again, I couldn't connect that to what
21 was going on in his case.

22 Q. Was that in your mind evidence of disordered
23 thinking?

24 A. I think it goes along with that. In other
25 words, he may very well have, you know, had a problem or

1 gotten injured in that situation, but I just couldn't, I
2 could not get the connection as to what it had to do
3 with any of this.

4 Q. What was your opinion in terms of his
5 competence to stand trial at the end of that meeting?

6 A. I said that it was a little less clear-cut for
7 me because I thought that he understands the system at a
8 certain level, you know, just as he did the first time
9 around, I think he understands the roles of the
10 participants, but I think he has problems with
11 decisional competence, in other words, being able to
12 look at the facts against you, the facts for you, the
13 strength of your case, to take the advice of your
14 lawyer, and then go forward on that basis. And I think
15 that his thought processes about that are distorted and
16 that he had difficulties in those areas that would make
17 it very difficult for him to proceed.

18 Q. So ultimately did you draw a conclusion about
19 competence to stand trial?

20 A. I said -- I thought he was inclined to be
21 viewed he was incompetent to proceed and that, you know,
22 now he had the medications, and I don't know, you know,
23 one of the things, you know, if he's rapid cycling
24 that's always the possibility like, for example,
25 tomorrow he may be having a very good day, all right,

1 but the problem is is that you could schedule a hearing
2 and have a very different person show up for it.

3 Q. The way he conducted himself here in the
4 courtroom today, what conclusions did you draw with
5 respect to his competence to stand trial based on that
6 observation?

7 A. What I would say is, you know, look, I don't
8 like to conflate diagnosis with competence, but I think
9 at the point where you are in a full-blown manic
10 episode, and that's what I think I was observing, and
11 you know, I've seen him and I know what thought
12 processes tend to be associated with that, I don't think
13 when you're that acutely involved in that process that
14 you can really go forward.

15 Q. And, doctor, did you also look at the issue of
16 whether or not, assuming Mr. Mahoney was found
17 competent, whether he's competent to represent himself?

18 A. I don't think so. I don't think that he could
19 stay on topic. I don't think the jury would follow what
20 he was saying. I don't think that he could present a
21 case that, you know, told a story A, B, C, and therefore
22 D, and I also think that he might become equally
23 agitated.

24 Q. And you heard Dr. Kissin talk about in the
25 number of competency evaluations that are done, that the

1 vast majority come to a conclusion of competency?

2 A. Yeah, I heard that.

3 Q. Is that accurate?

4 A. Well, you know, just coincidentally I'm
5 researching an article on the subject and the research
6 that I have seen mostly by Jennifer Skeem indicates this
7 wide variability, but in the sample they took which is
8 of several I think like in the Carolinas and a couple
9 other places, that the average incompetency rate is
10 36 percent of people referred to competency evaluations,
11 although they had some providers, one psychiatrist in
12 particular never found anybody incompetent, and that
13 some people found them up in the forties or fifties. I
14 think actually there was somebody that was 60 percent.
15 I think there were a couple hundred providers. It also
16 varies across disciplines. Psychiatrists tend to find
17 people competent at a higher rate, social workers find
18 incompetence at the highest rate, psychologists are
19 somewhere in the middle, but one percent is an outlier.

20 Q. And can you give the court any I guess reason
21 why there might be different determinations of
22 competency. By different --

23 A. Yeah, there's a recent study. Personally if
24 it was up to me I think it's probably better just to
25 describe what you saw, and I think since it rests with

1 the court anyway, the ultimate issue, you know, somebody
2 would think, well, what does anybody care about what I
3 think about the ultimate issue, it's up to the court,
4 but I think it comes from different definitions that
5 clinicians have to themselves in what constitutes
6 competence or incompetence, and some people are more
7 conservative, some people are more liberal, some people
8 go into it more deeply and, you know, I think that's the
9 reason why people disagree.

10 MR. GARRITY: I have no further questions.

11 THE COURT: Okay. I know you're going to
12 cross-examine, Mr. Huftalen. Let me ask just a quick
13 definitional question before we move on. I know I've
14 read in other psychological and psychiatric reports in
15 other cases that I've worked on either as a counsel or a
16 judge, the term racing thoughts.

17 THE WITNESS: Yes.

18 THE COURT: And it reminds me in some way of
19 this idea of pressured speech, but they're not the same
20 thing; right?

21 THE WITNESS: They are very similar except one
22 is actually the way you're talking.

23 THE COURT: Well, is pressured speech a
24 manifestation of either rapid cycling or racing thoughts
25 or something?

1 THE WITNESS: It almost always is. There are
2 some organic conditions that can cause it, too. You're
3 talking fast because you're thinking fast.

4 THE COURT: All right. And Mr. Mahoney, he
5 thinks very fast. He's intelligent but he also, his
6 minds sometimes appears to me, based upon what he is
7 saying, to be racing.

8 THE WITNESS: Yes.

9 THE COURT: Do you share that assessment?

10 THE WITNESS: Absolutely. I mean, it's
11 unusual for me not to be able to keep up with notes.

12 THE COURT: Yup, all right. Mr. Huftalen,
13 please proceed.

14 MR. HUFTALEN: Dr. Mart, I don't have many
15 questions for you.

16 THE COURT: Oh, okay. I have a couple more
17 questions that I want to ask Mr. Mahoney.

18 MR. HUFTALEN: I said I don't have many
19 questions.

20 THE COURT: Oh, many. I thought you said you
21 don't have any.

22 MR. HUFTALEN: I'm sorry.

23 THE COURT: Go ahead.

24 CROSS-EXAMINATION

25 BY MR. HUFTALEN:

1 Q. When you were talking about Mr. Mahoney
2 cycling, you talk about cycling fast, you can have a
3 good day or a bad day, schedule a hearing, you see one
4 person and then the next day see something else, in your
5 observations of Mr. Mahoney, would it be expected or
6 would you expect that Dr. Kissin and the people down at
7 Devens would not have seen him cycle over a six-week
8 period?

9 A. I think it's quite possible. I think that he
10 may have, you know, as time has passed he may have moved
11 into another phase of this. You know, I mean, I take
12 them at their word that they didn't see this kind of
13 behavior. But, you know, his behavior in court that I
14 observed is different than their description as behavior
15 at Fort Devens, so that suggests to me that maybe he
16 wasn't as manic when they saw him.

17 Q. I'm not sure at what point during Dr. Kissin's
18 testimony you walked in the courtroom, but you've read
19 her report and you've heard at least part of her
20 testimony. It seems to me that you guys disagree on the
21 ultimate opinion, but generally speaking, you don't
22 disagree with respect to most of the observational
23 aspects. Is that right?

24 A. I think so. I suspect that he was not showing
25 such severity of symptoms at the time she saw him. But

1 yeah, I would agree that basically, you know, I agree
2 with many of her conclusions.

3 THE COURT: But your diagnosis is different.
4 You both diagnose different, to use your words, flavors
5 of bipolar; right?

6 THE WITNESS: Yes.

7 THE COURT: Bipolar II was her diagnosis and
8 your's was Bipolar --

9 THE WITNESS: NOS with psychotic features.

10 THE COURT: All right.

11 Q. BY MR. HUFTALEN: And that's the real
12 difference between your diagnosis and hers, the
13 psychotic features; correct?

14 A. Yes, although I think that he's closer Bipolar
15 I, but Bipolar I doesn't include delusional thinking.

16 Q. I'm sorry?

17 A. Bipolar I doesn't include delusional thinking.

18 THE COURT: Does not include delusional
19 thinking.

20 Q. All right. And you think that his thoughts
21 with respect to an alleged conspiracy between his
22 attorney and other people to get him is delusional in
23 nature?

24 A. Yes.

25 Q. Is it possible that it's just he sees the

1 facts differently than you and me and it's not the
2 technical or the psychological definition of delusional?

3 A. Well, he said to me on more than one occasion
4 that the judge hearing this case and Attorney Garrity,
5 because of a specific case that they had in Superior
6 Court, were out to get him, to make his life difficult,
7 right, and I, you know, I think what we might be hung up
8 on here are this. There are bizarre delusions and there
9 non-bizarre delusions, right? Bizarre delusions would
10 be that my attorney is a werewolf, right? Most believe
11 there aren't any, right? A non-bizarre delusion is my
12 wife is having an affair and there's no factual basis
13 for that and there's no evidence of it, but I've
14 developed a fixed belief, so I think that I would
15 characterize those as non-bizarre delusions.

16 Q. Mr. Mahoney made reference to a person named
17 David, I think he said Hilts, but I'll represent to you
18 that there's a David Hilts who is in the Attorney
19 General's Office, and David Hilts has been involved in
20 litigation with Mr. Mahoney over this issue of sexual
21 offender registration in New Hampshire, and I don't know
22 if you heard him talk about David Hilts and me, Arnie
23 Huftalen, being in cahoots together today which resulted
24 in the charges being brought against him. Did you hear
25 him say that?

1 A. I'm not sure. I may have.

2 Q. If you were to say that David Hilts and Arnie
3 Huftalen were working together and as a result of their
4 working together, I'll avoid collusive, but as a result
5 of working together I was charged in federal court with
6 failing to register as a sex offender, and if I were to
7 tell you that David Hilts handled independent litigation
8 in state court with respect to whether Mr. Mahoney was
9 appropriately listed on the sex offender web page and
10 has nothing to do with my case, would you describe his
11 comment about Mr. Hilts and myself working together as
12 delusional or just a misunderstanding on his part?

13 A. I think it could easily be a misunderstanding.
14 I don't want to give the impression that everything that
15 Mr. Mahoney says is wrong, right? In some cases it may
16 just be that I'm not able to follow it or have
17 sufficient background to all this. But that could
18 easily just be, you know, these two guys are working
19 together, I think they are both, they don't like me and
20 that's why they are doing this, they have a particular
21 animus against me. That might be wrong but that
22 wouldn't necessarily be delusional.

23 Q. I wasn't sure I understood your testimony with
24 respect to the judge in Rochester holding a paper up.
25 Is it your opinion that his comments about the judge in

1 Rochester were delusional or that was just him taking
2 issue with another person in the judicial arena?

3 A. The reason I brought that up was because he
4 was trying to explain to me and I could not follow the
5 explanation. In other words, he was talking about the
6 judge holding up a paper, and then he would go on to
7 explain why that was significant, and I just couldn't
8 get why that was a problem, and whether it was a good
9 thing for him or a bad thing for him or if it had
10 anything whatsoever to do with what we were talking
11 about.

12 Q. You said that you think, at one point at least
13 you said you think that he understands the system but
14 has a problem with decisional competence?

15 A. Yes.

16 Q. We could probably agree that we each know a
17 lot of people who have problems with decisional
18 competence in the vernacular, but is that a sliding
19 scale, and if it's a sliding scale, where do you draw
20 the line and say that's a mental disease or defect that
21 makes him incompetent?

22 A. Well, I wouldn't say that frankly. What I
23 would say is I think this person's ability to do
24 something is impaired and I think it's impaired enough
25 that they can't proceed, and the delusional part is just

1 explanatory. And the reason for that is that he's got
2 X, Y or Z condition.

3 Q. I apologize, I misunderstood you. When you
4 started to say that at one point in time at least you
5 thought he understood the system, but he had a problem
6 with decisional competence, I thought you were saying
7 but for the problem of decisional competence, perhaps I
8 might find him to be competent.

9 A. I thought in my second report I said I thought
10 that was where the problem lay, that he's got deficits
11 in decisional competence.

12 Q. And do you see that necessarily tied to
13 Attorney Garrity or do you think that that's an
14 overarching problem Mr. Mahoney has and would have with
15 other lawyers as well?

16 A. I think it's a broader problem. I don't think
17 it's just his thoughts, which wax and wane about
18 Attorney Garrity. I think it has to do with his
19 decisions like, well, would I be better off having a
20 lawyer or not having a lawyer. I want to be clear.
21 Someone, I think you pointed this out, could make that
22 decision and just be wrong, show poor judgment, and you
23 know, that's just the way it goes, you probably should
24 have had a lawyer, you decided you would do it yourself,
25 doesn't necessarily make you competent or incompetent to

1 represent yourself. But I think that he has difficulty
2 taking the facts and weighing them in a rational manner
3 that would allow him to understand the process well
4 enough to proceed.

5 MR. HUFTALEN: Thank you very much. Your
6 Honor, I have no other questions.

7 THE COURT: All right. Does Doctor, what was
8 her name, Kissin, she defined delusion. Does delusion
9 have a different definition in, say, psychiatric field
10 DSM than it does in the dictionary, English usage?

11 THE WITNESS: Broadly, no. I think that
12 psychologists and psychiatrists kind of slice and dice
13 it up a little bit more, talk about different kinds, but
14 it means believing something that's not factually true
15 and not just because of a mistake but because of some
16 kind of problem in the process.

17 THE COURT: Okay. All right. Now, I want you
18 to stay on the stand. I have a couple questions for Mr.
19 Mahoney and possibly for counsel. Of course defense
20 counsel, if you don't want Mr. Mahoney to answer any
21 question I ask him, then you advise him not to and he
22 doesn't have to, so bear that in mind.

23 MR. GARRITY: Yes.

24 THE COURT: Mr. Mahoney, I asked you during
25 the other doctor's testimony if you were under the

1 impression or belief that your lawyer, Mr. Garritty, was
2 involved in a conspiracy with the prosecutor against
3 your interests and you told me you thought that they
4 were.

5 THE DEFENDANT: At that time I did, your
6 Honor, I did because of the facts of the case that I got
7 after Dr. Kissin gave me the report which indicated that
8 I did not know about, and so late in July it was the
9 fact that these two gentlemen had actually spoken on the
10 issue --

11 THE COURT: So you thought they had
12 information that they hadn't shared with you?

13 THE DEFENDANT: They did not share at that
14 time, judge, no, they didn't. But to ask a doctor --

15 THE COURT: Wait, wait, let me ask a question.
16 I want to work through this.

17 THE DEFENDANT: Okay.

18 THE COURT: And I asked you whether you were
19 still under that belief and you told me yes, you are.

20 THE DEFENDANT: Well, I mean, judge, when
21 looking at a case here --

22 THE COURT: Wait a minute. You don't have to
23 justify it, I'm just asking if that's what your belief
24 is.

25 THE DEFENDANT: I think this looking at a

1 case, you know, got way out of control. I think when I
2 was put on the web page as I explained to you,
3 immediately I went and filed a civil suit which I
4 dropped recently, by the way, because I think it's more
5 important, freedom is a price like you can't get. I
6 didn't get into this to lose my freedom. I got into
7 this to prove one thing, aggravated felonious sexual
8 assault, and I was put on the web page for an aggravated
9 rape, which is a factual because both of those --

10 THE COURT: I understand that. I just need a
11 few answers to a few questions.

12 THE DEFENDANT: I just think it was
13 misinformation, I should use the word instead of
14 conspiracy, because again, I think Mr. Garrity has been
15 with me the whole time for this whole process and of
16 course trying to get back to society I'm trying, one
17 thing I can say, both doctors, they never stated that I
18 never understood the natures and consequences --

19 THE COURT: I understand all that. Hold it.
20 Let me ask some more questions because I want to get
21 through some of your opinions and ask the doctor.

22 There has been some talk in the case that you
23 had the belief that your lawyer and myself, when I was a
24 prosecutor, engaged in some conspiratorial conduct
25 against Mr. Belton.

1 THE DEFENDANT: If I can be --

2 THE COURT: Let me ask, do you remember that?

3 THE DEFENDANT: I have cited case law, yes,
4 sir, I do, sir.

5 THE COURT: All right, I remember the case
6 too, by the way.

7 THE DEFENDANT: But I'm not saying it was
8 anything illegal.

9 THE COURT: You don't need to, I just -- I
10 have two questions about that. Are you still under that
11 impression?

12 THE DEFENDANT: No, I'm not under that
13 impression anymore, judge, because he was guilty
14 obviously. I just think when you made him a plea offer
15 I think Mr. Garrity should have told Mr. Belton because
16 I believe he had a brain aneurysm if I'm not mistaken.

17 THE COURT: I can assure you of a couple
18 things.

19 THE DEFENDANT: Okay.

20 THE COURT: One, that that offer was made to
21 Mr. Belton. Two, that Mr. Garrity did convey it, and I
22 think we both thought it was a very good idea that he
23 would have taken it, but he didn't. That said, okay, do
24 you think that interaction between Mr. Garrity and
25 myself, conspiracy or not, does that impact you in some

1 way?

2 THE DEFENDANT: Well, it did and it doesn't
3 now. It did in the beginning because when I plugged
4 into the query, I saw ineffective counsel and the first
5 thing that pops up is that case. Now this gets me
6 saying wait a minute. I see prosecutor Laplante, and
7 that's the case, the very first case when I plugged it
8 into the computer at Strafford County turns up
9 ineffective counsel. I was under the impression, then I
10 saw your name, and I says the judge, how could a judge
11 normally appoint me an attorney that he had been with
12 that maybe had ineffective assistance of counsel before.
13 And it wasn't the case law, it was just the answer 113.

14 THE COURT: If I understand what I read, what
15 you thought happened was I must have picked your lawyer
16 on purpose to get to get you --

17 THE DEFENDANT: Knowing at that particular
18 point, judge, and of course I can't be a hundred percent
19 because I do remember because I'm very, very smart with
20 the law, I do remember you saying Jeff Levin is a good
21 attorney. If I give you another attorney, he's not
22 going to be as good as Jeff Levin. Well, Jeff Levin has
23 to deal with another client named Brian Mahoney which my
24 whole record had been brought forward with Judge
25 McCafferty. Not one word talked about me. And this is

1 what I'm being held on and I think at that point when
2 you look at it, every time a defense lawyer takes time
3 is the first thing he should do is go to the First
4 Circuit Court of Appeals and raise the issue of bail,
5 and Mr. Garrity never did, and he never did, I don't
6 know why, but I thought that should have been an issue,
7 and I've been held now 17 months and I'd like to go
8 home.

9 THE COURT: All right, now, all right, I
10 understand I think.

11 THE DEFENDANT: That's what I was looking at.

12 THE COURT: So you had the idea based on
13 seeing all these things.

14 THE DEFENDANT: I just plugged in ineffective
15 counsel and I see you. I didn't know you were a
16 prosecutor. I said this is my opinion based only on my
17 opinion that you just recently became a judge between
18 2008 and present, so you just became a judge, that's my
19 opinion, because it looked like your cases go back
20 almost 24 years as a prosecutor.

21 THE COURT: All right, so your thought was
22 that I must have given you a lawyer that wouldn't serve
23 your best interest on purpose.

24 THE DEFENDANT: I thought because of the fact
25 that I did see David Hilts on February 18th when he was

1 here at my hearing when I was firing Levin, and also
2 some of the Department of Safety people were here, I
3 think what we have in this case, judge, between
4 Massachusetts and the Department of Safety, there was
5 definitely some miscommunications. There was some
6 definitely wrongdoing to me that shouldn't wound up
7 having me be present in a federal court when no federal
8 laws were actually broken.

9 THE COURT: Okay, you anticipated one of my
10 questions a minute ago. You mentioned Mr. Levin,
11 Attorney Levin.

12 THE DEFENDANT: Yes.

13 THE COURT: And I remember in February of 2011
14 Mr. Levin filed a motion saying that we should have a
15 hearing and you wanted to go pro se.

16 THE DEFENDANT: I wanted to, I didn't want to
17 use Mr. Levin's motion to dismiss because if you look at
18 it he parroted Attorney Levin -- excuse me, Huftalen, he
19 parroted that Mr. Mahoney is required to register on
20 a --

21 THE COURT: All right, I just need you to
22 explain to me, though.

23 THE DEFENDANT: Yes.

24 THE COURT: So you were dissatisfied with
25 Attorney Levin for what reason?

1 THE DEFENDANT: The reason that he had filed a
2 motion to dismiss that said Mr. Mahoney is required to
3 register as a sex offender for a February 12, 1982
4 charge and conviction September 23rd, 1983, and I
5 remember perfectly, judge, before I even met you, I met
6 Paul, Attorney Garrity. I said Mr. Attorney Garrity, if
7 Arnie Huftalen mentioned September 23rd, 1983, not only
8 did we have an appeal with that case, that case is still
9 a very active case. In 2005 my second appeal was
10 denied, but it was not deemed, the certificate of
11 forfeiture was required by the Massachusetts --

12 THE COURT: All right, I'm just trying to
13 understand. So there was something about what Levin did
14 that made you think he wasn't serving your best
15 interest.

16 THE DEFENDANT: Well, what Levin did was he
17 said I was required to register as a sex offender, and
18 that's just not true for the 1982 case.

19 THE COURT: But he was moving to dismiss your
20 case.

21 THE DEFENDANT: He tried to dismiss it but
22 when I saw -- my roommate in Strafford County back then
23 --

24 THE COURT: Wait a minute. When you saw that
25 he said you had to register in the eighties, that upset

1 you and you thought I got to get a new lawyer.

2 THE DEFENDANT: No, it goes back to he had the
3 other Brian Mahoney.

4 THE COURT: Oh.

5 THE DEFENDANT: That's the conflict of
6 interest right there. That was my roommate in Strafford
7 County in 2006 by the way. And as a matter of fact,
8 what I was told specifically, Jeffrey Levin wouldn't get
9 off the Brian Mahoney case unless the family hired
10 another one. I went and hired Mark Sisti just to get
11 rid of Levin back in 2006 in June. So I thought there
12 was a conflict, basically Jeff Levin having two Brian
13 Mahoneys when my case wasn't incorporated with the other
14 Brian Mahoney, that they actually held me on --

15 THE COURT: Now, Mr. Huftalen, you had some
16 conversations with Attorney Levin, I assume, at the time
17 when he moved for status of counsel and he was removed
18 from the case and Mr. Garrity was appointed. What's
19 your recollection of what transpired there?

20 MR. HUFTALEN: Well, as the court knows Mr.
21 Levin is very careful not to violate attorney/client
22 privilege in that case and he didn't in this case.

23 THE COURT: Of course.

24 MR. HUFTALEN: He implied to me that Mr.
25 Mahoney felt that Mr. Levin had sold him out and that he

1 had somehow agreed with the government with respect to a
2 material fact that he should not have. Hearing Mr.
3 Mahoney speak now, that makes sense --

4 THE COURT: That makes sense.

5 MR. HUFTALEN: But I didn't know the
6 particulars at the time.

7 THE COURT: Okay.

8 THE DEFENDANT: Because the first felony
9 charge, judge, was 22050, whoever is required to
10 register, and there are so many, but October 31, 1994,
11 above that you have to register. Anything prior --

12 THE CLERK: Slow down, Mr. Mahoney.

13 THE DEFENDANT: Anything prior before that, if
14 you sentence him, your probation and incarceration is
15 completed because --

16 THE COURT: I understand all that, I do.

17 THE DEFENDANT: That case, that's Hartley
18 versus the Attorney General of New Hampshire.

19 THE COURT: Dr. Mart, Dr. Mart, my question
20 for you is this, and draw on what you heard to the
21 extent you feel necessary or advisable. I'm wondering
22 about the impact of delusions, bizarre enough, just
23 delusional thinking about defense counsel's conduct and
24 how it might effect other factors that pertain to
25 competency. In other words, for lack of a better word,

1 to labor under the delusion, it appears to me repeatedly
2 that counsel is acting against your best interest, I
3 wonder how it affects the mania, I wonder how it affects
4 the emotional, the anxiety level and some of the things
5 you talked about. How can that impact competency and a
6 number of factors that inform competency.

7 DR. MART: The delusional belief?

8 THE COURT: Yeah, this delusional belief. The
9 one we're talking about now.

10 DR. MART: Well, I think it, I think it's part
11 of a larger picture, right. I was listening carefully
12 to that.

13 THE COURT: Yeah.

14 DR. MART: If you think about the structure of
15 what Mr. Mahoney was just saying, right, he has Attorney
16 Garrity. He looks up attorney misconduct or poor
17 representation, right, finds a case where ineffective
18 assistance of counsel, where he was the defense attorney
19 and you were the prosecutor, right.

20 THE COURT: Right.

21 DR. MART: Okay, now, what would be logical.
22 Well, maybe Attorney Garrity is not such a good lawyer
23 would be one conclusion somebody could draw from that
24 information.

25 THE COURT: Maybe, of course that was never

1 established.

2 DR. MART: I'm not implying that, I'm just
3 saying if you're sitting at your computer in Strafford
4 County.

5 THE COURT: Okay.

6 DR. MART: How does it follow that you would
7 have an interest in appointing him an attorney who would
8 not do a good job representing him? In other words, I
9 understand why on the face of that he would have
10 mistrust of Attorney Garrity. What do you have to do
11 with that?

12 THE COURT: You're telling me about how he
13 might have delusion, some sort of flawed thinking. That
14 I'm persuaded about. I'm wondering how that affects
15 everything else. To be competent to stand trial you've
16 got to assist counsel.

17 DR. MART: Right.

18 THE COURT: And two things, you know, one,
19 there's the problem of consistently perceiving counsel
20 as working against your best interest. That's more
21 often or not based on a delusion. And then what that
22 does to the rest of your emotional and mental state. It
23 seems to me to be a very difficult set of conditions for
24 a defendant to operate under to have this belief, this
25 delusional belief, bizarre or not, that his counsel is

1 acting against him. It could affect his, you know, it
2 could affect a number of things, it just seems to me to
3 be a trigger.

4 DR. MART: You know, it's interesting, I will
5 make this very brief. I had a conversation with a well
6 known psychologist out in Arizona, Joe Boskin, and he
7 said one of the problems is that when you start looking
8 at one thing, you know, you look through the lens of
9 delusion you don't think about the other things. In an
10 example he said why do people who are diagnosed with
11 schizophrenia kill themselves at such a high rate, you
12 know, he said why is that. He said because they are
13 depressed, because it sucks to be schizophrenic, right,
14 but because we're looking at people who have
15 schizophrenia, you don't think about the fact that there
16 are people who also get depressed about their situation,
17 and you're absolutely right. I think that if he's got
18 this idea that he can't get a fair shake, and that
19 people who he should be able to trust and depend on are
20 against him, that would raise his anxiety level and
21 could very well make him start, you know, thinking
22 faster, being more anxious, and one thing leading to
23 another.

24 THE COURT: All right. Thank you. All right.
25 Any follow-up questions for the doctor?

1 MR. GARRITY: No.

2 MR. HUFTALEN: I don't have any questions but
3 may I say something to the court? I'm not sure what the
4 court's intention is right now with respect to moving
5 forward and ruling on these issues, but if the court is
6 inclined, I would request that the court take this
7 matter under advisement at least for a day or two
8 because I'd like the opportunity to submit to you a
9 memorandum that at least addresses the statutory options
10 under 4241 that are presented in this case.

11 THE COURT: Sure, it was my plan to take it
12 under advisement anyway.

13 MR. HUFTALEN: Thank you.

14 THE COURT: All right, you can stand down.

15 DR. MART: Thank you.

16 MR. SCHULMAN: Judge, I have a procedural
17 issue, is that I see that there's a trial scheduled for
18 May 1st.

19 THE COURT: Yes.

20 MR. SCHULMAN: I have a civil jury trial and a
21 conflict with the May 1st date, and at this point I'm
22 just apprising the court of that now.

23 THE COURT: What court is the civil trial in?

24 MR. SCHULMAN: The civil trial is in
25 Rockingham County, been on the list for quite some time.

1 It is a co-counsel case, and in fairness, I'm new to the
2 co-counsel case, and as I say at this point I'm simply
3 alerting the court to a scheduling conflict.

4 THE COURT: I appreciate that.

5 MR. SCHULMAN: The other thing I should
6 probably say in open court with Mr. Mahoney here so that
7 the air is clean from this point forward, I too have
8 been on the other side of cases with your Honor, two
9 murder cases in state court and a couple of cases here
10 when your Honor was a prosecutor. I want to make sure
11 Mr. Mahoney --

12 THE COURT: He knows that.

13 THE DEFENDANT: That's understood. I was just
14 putting in ineffective counsel and that's the only thing
15 that popped up. Again, I think really, judge, what I
16 really would like to do, and we have already stressed
17 the point, and we do have two and of course if we need
18 three, is the fact that I really want to find closure in
19 this issue and register to the charge that I have on
20 9/23/1983, we haven't addressed.

21 THE COURT: So you're saying, I want to say
22 right now before I ask a question, whatever the answer
23 to this question is, it will never be used against him.
24 You're trying to tell me, there's been some discussion
25 that you would like to plead guilty under the right

1 conditions.

2 THE DEFENDANT: That is the deal today, judge.

3 In fact I could be going home today at 17 months --

4 THE COURT: Let me give you my thoughts on
5 this. I wasn't willing to -- there's the issue of
6 whether you're competent to enter a guilty plea and I
7 think I have an opinion on that. That said, if you
8 were, it would not be living up to my obligations to the
9 public and to you, really, to simply let you walk out of
10 this place today. When people are incarcerated and they
11 are freed immediately, it puts them in a very vulnerable
12 position and puts the public in a vulnerable position.
13 So, I haven't expressed any inclination against the
14 arrangement you worked out, but the transition needs to
15 be much better planned out, much better planned out, and
16 I need assurances about it's going in an orderly way
17 that protects you and protects the public.

18 Now, that said, here's my thoughts based on
19 what I heard today. These are preliminary thoughts.
20 I'm going to take the matter under advisement. I'm
21 going to appoint Attorney Schulman as co-counsel. I
22 hope you appreciate that. He's a very good lawyer, much
23 like Mr. Garrity, very experienced.

24 THE DEFENDANT: Thank you.

25 THE COURT: My, these are not rulings, they

1 are sort of preliminary leanings and I just want counsel
2 to be aware of and Mr. Mahoney to be aware of. I do not
3 think Mr. Mahoney is competent to proceed to trial pro
4 se. In other words, I don't think he's competent to
5 represent himself pro se at trial for a number of
6 reasons, mostly -- I think he's better versed in the law
7 than a lot of people, a lot of lawyers.

8 THE DEFENDANT: I get emotional, you know.

9 THE COURT: It's emotional. The problem is
10 containing the emotions and racing thoughts and
11 pressured speech. I think it could make it very, very
12 difficult for you to make a presentation to a jury in a
13 way they could appreciate and not simply tune you out.
14 But that's just a very preliminary sort of finding. I
15 do think, based on everything I've read and seen, that
16 you are very likely competent to enter a plea. And
17 because I think, you know, to use the MacArthur
18 language, I can't apply the MacArthur scale, but to use
19 that language, you do seem to have in the first and
20 second Axis, very good understanding and very good
21 reasoning, and on the appreciation point number three,
22 based on what I've read and heard I think with respect
23 to the consequences of a plea and how it affects you, I
24 think you probably are pretty well positioned. Again,
25 that's very preliminary.

1 The third one is the question of competency to
2 stand trial, which would be the ultimate decision, if
3 you went to trial. That's a closer call. I feel pretty
4 confident about the first two things I've preliminarily
5 indicated. The third one, very much under advisement in
6 my mind, and it would require more thought and
7 consideration and some research by me, but I appreciate
8 everybody's presentations, including yours, Mr. Mahoney.

9 So, the matter is under advisement. We are
10 scheduled for trial in May. That said, I assume that
11 you will continue to do your jobs as we proceed. And
12 you wanted to file something?

13 MR. HUFTALEN: Yeah, I thought of it when Mr.
14 Schulman talked about the trial he was scheduled for. I
15 mean, I also have conflicts and I know that you won't
16 find my conflicts in 3161, speedy trial rights, but if
17 we end up having to go to trial, I will be advising the
18 the court that I'm a computer prosecutor and we have an
19 annual conference of computer prosecutors once a year,
20 it happens to be scheduled for that week, and I'm asked
21 to speak on Tuesday and Wednesday and Thursday of that
22 week at that conference, but I'll deal with counsel on
23 my conflict issues.

24 THE COURT: And to me that's an office
25 staffing issue. This seems like a case that while I

1 think we'd all benefit from your expertise in this area,
2 and certainly you're very well versed in it, a failure
3 to register case seems like a case that could be handled
4 by other people, if necessary, in the office, right?

5 THE DEFENDANT: Well, I object to that, judge,
6 this is a federal failure which involves interstate
7 commerce travel.

8 THE COURT: I know, but he's got an office
9 full of federal prosecutors.

10 THE DEFENDANT: I understand that, judge, I
11 just want the federal court know this is not just
12 failure to register.

13 THE COURT: No, you're absolutely correct.

14 THE DEFENDANT: And I'm being held still, and
15 I have not committed another crime in that nature in
16 31 years.

17 THE COURT: And I will repeat to you what I've
18 said to you once today. I do not want you to be
19 incarcerated, either civilly or criminally, for a minute
20 longer than is required by law, and I mean it, all
21 right?

22 We are in recess. The matter is under
23 advisement. Keep me apprised.

24 (Court adjourned at 6:20 p.m.)

25

1 C E R T I F I C A T E

2

3 I, Sandra L. Bailey, do hereby certify that
4 the foregoing transcript is a true and accurate
5 transcription of the within proceedings, to the best of
6 my knowledge, skill, ability and belief.

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9 Submitted: 8/3/12

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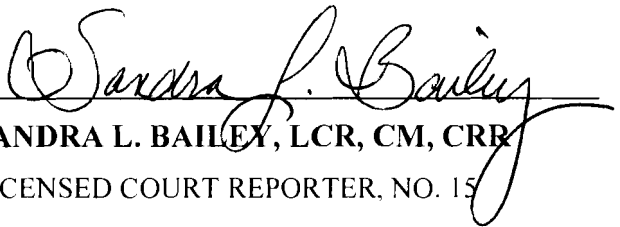
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